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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY and METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents,* and NATIONAL RAILROAD PASSENGER CORP., *Intervenor.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was the Court of Appeals correct in holding that a taking in eminent domain did not occur in the circumstances of this case when the Interstate Commerce Commission, acting under the authority of Sec. 402(a) of the Rail Passenger Service Act, ordered Petitioner MTA to permit National Railroad Passenger Corp. ("Amtrak") to operate eighteen trains a day over MTA's railroad indefinitely?

2. Was the Court of Appeals correct in holding that assuming a taking did occur, Congress' assignment to the Commission, rather than to an Article III court, of the power to decide a compensation dispute arising out of the ordered use does not violate the Constitution?

3. Was the Court of Appeals correct in holding that the Constitution is satisfied when the application of the avoidable costing compensation methodology required by Sec. 402(a) to the circumstances of this case results in Amtrak contributing such insignificant sums toward the costs incurred by Petitioners in the maintenance and operation of MTA's railroad as to approach the proportions of a free-ride, and contributing nothing toward a return on investment?

DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioners Metropolitan Transportation Authority ("MTA") and Metro-North Commuter Railroad Company ("Metro-North") state that (a) this is the original designation of corporate relationship of each of them, (b) MTA is the parent and sole owner of Metro-North, (c) other than wholly-owned subsidiaries, MTA has no other subsidiaries, (d) MTA is not owned by any parent, (e) Metro-North has no subsidiaries, (f) except for other wholly-owned subsidiaries of MTA, Metro-North has no affiliates, and (g) MTA has no affiliates.

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INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents,* and NATIONAL RAILROAD PASSENGER CORP., *Intervenor.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, Metropolitan Transportation Authority ("MTA") and Metro-North Commuter Railroad Company ("Metro-North"), respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered June 4, 1986, denying their petition for review of three interrelated decisions of the Interstate Commerce Commission ("Commission") served respectively, on August 3, 1984, October 29, 1984 and July 15, 1985, in the administrative proceeding ("Proceeding") denoted Finance Docket No. 30426 which the Commission conducted at the request of National Railroad Passenger Corp. ("Amtrak") pursuant to the applicable provisions of Section 402(a) of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. § 562(a).

OPINION AND DECISIONS BELOW

The opinion of the Court of Appeals and, in order of issuance, the three decisions of the Commission appear in the Appendix (hereinafter designated "App.") at 1a, 26a, 34a and 47a, respectively.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on June 4, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution, Art. III, § 1 and the Fifth Amendment, and the pertinent provisions of Section 402(a) of RPSA, 45 U.S.C. § 562(a), are set forth in the Appendix at 74a, 75a, and 76a, respectively.

STATEMENT

Proceedings Below

This case is the result of a disagreement between Amtrak and the Petitioners regarding the terms and conditions which, on and after January 1, 1983, should govern: (a) Amtrak's use for its passenger train operations of a line of railroad which Petitioner MTA holds under a long-term lease and (b) Amtrak's claim to the services of the officers and employees of Petitioner Metro-North, MTA's wholly-owned operating subsidiary, in making Amtrak's operations over that line possible. The line of railroad (herein, the "Hudson line") which is the subject of the dispute is that portion of the former Penn Central Railroad's Hudson line which extends from (and including) Grand Central Terminal, in New York City, northerly to the city of Poughkeepsie, New York, a distance of some seventy-five miles. It is under a

ninety-year lease to Petitioner MTA, a New York state agency. It is operated and maintained by Petitioner Metro-North, itself a New York state agency, which also operates a portion of MTA's so-called Harlem-Hudson commuter rail service over the line. Amtrak operates eighteen trains a day over the full length of the line into and out of the Terminal.

To resolve the disagreement, Amtrak, in February of 1984, sought an order from the Commission pursuant to the pertinent provisions of Sec. 402(a) of RPSA, 45 U.S.C. § 562(a)[1], compelling Petitioners to make the line and the services of Metro-North's officers and employees available to Amtrak and prescribing the terms and conditions which would govern the use. The Commission granted Amtrak's request, issuing the three decisions referred to above. Petitioners thereupon petitioned the Court of Appeals for review of those decisions pursuant to the provisions of 28 U.S.C. §§ 2321(a) and 2342(5). The Court of Appeals denied that petition on June 4, 1986.

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[1]The pertinent provisions of Sec. 402(a) read as follows: "The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree, which terms shall include a penalty for untimely performance. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable . . . In fixing just and reasonable compensation for the provision of services or for the use of tracks and facilities ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of serivce as a major factor in determining the amount (if any) of such compensation. . . ."

Facts

On April 16, 1971, the then bankrupt Penn Central Railroad ("Penn Central") took advantage of the benefits of the Rail Passenger Service Act[2] and turned over the whole of its system-wide long-haul[3] rail passenger service to Amtrak. The two on that date entered into a long-term agreement, denominated the Basic Agreement, under which Penn Central permitted Amtrak to operate the latter's long-haul trains over any part of Penn Central's rail system, and Amtrak thereupon commenced operating its trains over the Hudson line into Grand Central Terminal.

At the same time that Penn Central was negotiating with Amtrak to rid itself of the burden of its long-haul service, it was negotiating with Petitioner MTA to rid itself of the burden of the Harlem-Hudson commuter service. In this effort, too, Penn Central was successful. On June 1, 1972, it entered into an arrangement with MTA consisting of a number of contemporaneously negotiated agreements, dubbed by the parties the Harlem-Hudson Suburban Passenger Train Service Agreements, the effect of which was to continue Penn Central as the owner-operator of the commuter service, under a so-called service contract with MTA, but to shift to MTA all of that service's operating losses as well as the entire burden of financing the rehabilitation of the service's debilitated capital plant.

The capital plant for which MTA thereby assumed responsibility included all of Penn Central's rail facilities (much of it four-tracked) between Poughkeepsie and the Terminal, as well as

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[2]In *National Railroad Passenger Corporation v. Atchison, Topeka and Santa Fe Railway Company*, ___ U.S. ___, 105 S. Ct. 1441 (1985), this Court analyzed the intent and the mechanics of the Rail Passenger Service Act.

[3]The term "long-haul" is used synonymously herein with the term "intercity" which Congress employed in RPSA. Both terms are understood in the rail industry as including all passenger service other than commuter service.

the whole of the Terminal. It was expected that the demands of the commuter service, along with the demands of the New Haven commuter service, already subsidized jointly by MTA and the State of Connecticut under an arrangement similar to the Harlem-Hudson arrangement and operating between New Haven, Connecticut, and the Terminal, would require the use of the whole of that capital plant even if the long-haul passenger and freight services were eventually to be discontinued. One of the principal documents making up the several Harlem-Hudson agreements was a long-term lease of the whole of the Hudson line, from Poughkeepsie to and including the Terminal, to MTA, the so-called Harlem-Hudson Lease.

In negotiating the Harlem-Hudson Lease, Penn Central took care to protect Amtrak's prior operating rights over the Hudson line under the Basic Agreement. MTA took its leasehold subject to those rights. At the same time, Penn Central reserved trackage rights over the line to permit it to continue operating its own freight service, and, for reasons of its own, it also reserved the right to run its own long-haul passenger trains over the line, even though by then (June 1, 1972) Penn Central was no longer in the long-haul passenger business. These reserved long-haul passenger train trackage rights were not assigned to Amtrak so that the sole legal basis for Amtrak's use of the Hudson line continued to be the 1971 Basic Agreement.

In the give-and-take of the negotiation of the Harlem-Hudson agreements, Penn Central was successful in having these trackage rights which it had reserved for itself, freight and long-haul passenger, conceded to it essentially free-of-charge up to certain stipulated traffic levels. This concession by MTA followed the pattern set earlier in the New Haven subsidy arrangement.

In 1973 Congress enacted the Regional Rail Reorganization Act of 1973 ("Rail Act")[4] and compelled the still bankrupt Penn

[4]In the *Regional Rail Reorganization Act cases*, 419 U.S. 102 (1974), this Court analyzed the intent and the mechanics of this Act.

Central, among others, to turn over the great bulk of its rail assets to the federally-chartered Consolidated Rail Corporation ("Conrail") under a rail system rationalization plan to be developed by a public agency, the United States Railway Association ("USRA"). That plan, the Final System Plan, took effect on April 1, 1976, and Penn Central stepped out of the picture for all purposes except one; it remained, curiously, and still is, the fee owner of the property subject to the Harlem-Hudson Lease—MTA's landlord—although its only function, because the lease is completely net, is to collect rent from MTA. Despite the fact that Congress, in the Rail Act, had specifically instructed USRA to devise a plan which required Conrail to assume Penn Central's obligations under the "leases and agreements" constituting the Harlem-Hudson and New Haven commuter subsidy arrangements[5], USRA simply designated the free trackage rights which Penn Central had reserved under the Harlem-Hudson Lease, freight and long-haul passenger, for transfer to Conrail. Its designations with respect to the New Haven line were similarly limited; Connecticut's leasehold from Penn Central remained intact. App. 113a, 131a and 132a.[6] No explanation for this was given in the plan.

This tenuous legal basis for its occupancy of MTA's and Connecticut's leaseholds notwithstanding, Conrail took over Penn Central's commuter service workforce on April 1, 1976, took an assignment from Penn Central of its commuter service contracts with the two states, and for the ensuing six and one-half years

[5]Rail Act, Sec. 303 (b)(2), 45 U.S.C. § 743 (b)(2). The Special Court created to interpret the Rail Act has acknowledged that the direction in subsection (b) (2) that local "financial support arrangements" in effect on January 2, 1974 be preserved was directed essentially at just two such arrangements, the Harlem-Hudson arrangement and the New Haven arrangement. *Consolidated Rail Corporation v. Metro-North Commuter Railroad Company*, 598 F.Supp. 1571 (Sp. Ct. RRRA 1984), at 1581 n.7.

[6]Pertinent excerpts from the Final System Plan, including the designations for transfer referred to herein, appear in the Appendix.

proceeded to do for MTA and Connecticut exactly what Penn Central had agreed to do under the two subsidy arrangements.

During those six and one-half years, Amtrak continued to operate its daily quota of trains over the Hudson line into the Terminal. MTA assumed that Amtrak's right to do this was the result of Conrail's assignment over to Amtrak of the free, long-haul passenger trackage rights which Conrail had received from Penn Central under USRA's plan,[7] but even if it had been told otherwise, MTA would not have objected because it believed that, with the Harlem-Hudson Lease still in force, it had to continue to respect Amtrak's prior rights under the Basic Agreement.

What MTA was not told during those six and one-half years was that Amtrak, for reasons of its own, had neither sought nor received from Conrail an assignment of Penn Central's free long-haul trackage rights over the Hudson line—a circumstance which continues to the date of this Petition--and that effective upon the Rail Act's assets transfer date, April 1, 1976, Amtrak and Penn Central terminated the Basic Agreement.[8]

These facts became known to MTA in 1983 and 1984 as an indirect consequence of Congress' enactment of the Northeast Rail

[7]Conrail was to be a freight-only railroad. USRA's plan, and the Rail Act itself, Rail Act, Sec. 206(c)(1)(C), 45 U.S.C. § 716(c)(1)(C), contemplated the pipe-through to Amtrak, through Conrail, of such rail facilities (or rights thereover) as Amtrak needed to own in order to continue its operations over the Penn Central system.

[8]This termination was part of an overall settlement between Amtrak and Penn Central which was not formalized until February 15, 1978, but the settlement was made retroactive to the transfer date. MTA does not know why Amtrak surrendered the Basic Agreement. It is assumed, however, that Amtrak had no choice because Conrail was probably dissatisfied with its compensation provisions and refused to assume it from Penn Central. The Basic Agreement was explicitly excepted from the general assignment of executory contracts which Penn Central gave to Conrail on April 1, 1976, as a part of the Rail Act reorganization process.

Service Act of 1981 ("NRSA"), the name given to Subtit. E. of Tit. XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 643(1981). That remarkable act summarily directed Conrail to get out of the commuter rail business, systemwide, on January 1, 1983, its service contract obligations to MTA and Connecticut notwithstanding. NRSA, Sec. 1136. As a consequence of its enactment, during most of 1982 and much of 1983 MTA and Connecticut negotiated with Conrail and Amtrak in an effort to persuade them to start paying for their use of the two states' leaseholds. The states argued that with the abrogation of Conrail's commuter service obligations to them, there was a failure of consideration for the free trackage rights under which Conrail and, presumably, Amtrak had been operating their freight and passenger trains and that those rights had terminated. Moreover, the two states pointed to provisions in the newly enacted NRSA which specifically directed both Conrail and Amtrak, effective January 1, 1983, to pay MTA and Connecticut "just and reasonable" compensation for their use of the leaseholds. NRSA, Sec. 1137, adding Sec. 504(f), 45 U.S.C. § 584(f), among other new provisions, to RPSA.[9] Conrail and Amtrak argued that the leaseholds, and the trackage rights reservations within them, were legally severable from the abrogated service contracts and that new Sec. 504(f) had no application to the dispute.

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[9]The text of Sec. 504(f) reads as follows:

> "(f) Pre-January 2, 1974 leases and agreements. Amtrak Commuter shall not be subject to any lease or agreement with a commuter authority under which financial support was being provided on January 2, 1974, for the continuation of rail passenger service, except that [Amtrak] and Conrail shall retain appropriate trackage rights (for passenger and freight operations respectively) over any rail properties owned or leased by such commuter agency. Compensation for such trackage rights shall be just and reasonable."

The Court will note the reference to subsidy arrangements in effect on "January 2, 1974," the same technique by which Congress limited its references to subsidy arrangements in Sec. 303(b)(2) of the Rail Act to the Harlem-Hudson and New Haven arrangements.

The negotiations were unsuccessful and the disputants ended up before the Special Court created by the Rail Act.[10] The Special Court litigation began on September 20, 1983. The original parties were Conrail, Petitioners and Connecticut. Amtrak quickly intervened, but only for the purpose of protecting its claimed free trackage rights over the New Haven line. On February 24, 1984, Amtrak filed its Sec. 402(a) application. It was only then that Petitioners were told that Conrail had never assigned Penn Central's free long-haul passenger train trackage rights over the Hudson line to Amtrak. (Shortly before, in the preparation of the pleadings in the Special Court action, Petitioners had learned of the 1978 cancellation of the Basic Agreement.)

Upon learning of Amtrak's application, Petitioners asked the Special Court in the then-pending trackage rights action to stay the Commission from progressing the Proceeding, arguing as indicated above that new Sec. 504(f) of the RPSA required the payment to them of just and reasonable compensation for Amtrak's use of the Hudson line, that this mandate overrode the more general provisions of Sec. 402(a) of that Act and necessarily

[10]Ultimately, MTA and Connecticut lost this argument. *Consolidated Rail Corporation v. Metro-North Commuter Railroad Company*, 598 F. Supp 1571 (Sp. Ct. RRRA 1984). Faced with conflicting claims regarding the intentions of the contracting parties fifteen years earlier, the Special Court took the documents as written. The Harlem-Hudson Lease, in particular, and the free trackage rights reserved within it, were held to be legally severable from the Harlem-Hudson service contract, thanks to the manner in which they had been drafted. When MTA and Connecticut complained that most of their special benefits under the subsidy arrangements had been negotiated into the service contracts, now abrogated, whereas Penn Central's benefits (the free trackage rights) had been incorporated into the leases and were thus perpetuated, the Special Court observed that if the two states had any remedy, it was against the United States, the abrogator of the service contracts. But when MTA and Connecticut amended their complaints to seek damages from the United States for what Congress had done to them, the Special Court held, in a decision handed down in the same case on June 18, 1986, that damages could not be recovered for what it regarded as a legitimate exercise of the Commerce Power by Congress.

required the Special Court, not the Commission, to decide the issue of compensation,[11] that Sec. 402(a) was never intended by Congress to apply to Petitioners, and that if it did apply, it was to that extent unconstitutional. By an interim Memorandum—Order dated July 23, 1984, App. 137a, the Special Court denied the request for the stay, thinking it best that these points be raised in the Proceeding and that Petitioners exhaust their administrative remedies before the Commission and upon a review of its order. This Petitioners have done and by this petition are doing.

This Petition will be limited to the argument that if Petitioners are covered by Sec. 402(a), as the Court of Appeals has held, then that statute, as applied to them, is necessarily a condemnation act and, as such, it is unconstitutional either because: (a) it places in the hands of an agency other than an Art. III court the power to determine the issue of just compensation due Petitioners upon a taking under the Fifth Amendment, or (b) it mandates a methodology for determining the compensation due Petitioners upon that taking which produces less than the just compensation they are due under that Amendment. The Commission rejected each of these arguments and in each case it was sustained by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. In upholding the Commission, the Court of Appeals specifically decided that the process contemplated by Sec. 402(a) of RPSA and accomplished in this case, a physical occupancy of real property, not temporary or emergent in nature, for a public use or purpose against the wishes of its owner and at the express

[11]Sec. 504(f), as can be seen, is silent on the question of who is to resolve a dispute regarding the measure of "just and reasonable" compensation, although elsewhere in NRSA the Commission was specifically instructed to settle certain enumerated trackage rights disputes. Since Sec. 504(f) was added to RPSA by NRSA and since the interpretation of NRSA's workings was confided only to the Special Court, NRSA, Sec. 1152(1), Petitioners took it that that court was necessarily the arbiter.

command of a governmental agency clothed by the sovereign with the power to order the occupancy, does not amount to a taking within the meaning of the Fifth Amendment to the Constitution. To Petitioners' knowledge, this holding is unprecedented in this Court's decisions.

2. In upholding the Commission, the Court of Appeals specifically decided that even if a taking has occurred in the circumstances of this case, the Constitution permits Congress to authorize the Commission, through Sec. 402(a), to decide a dispute over the amount of compensation properly payable for the ordered use. This holding is in direct conflict with holdings of this Court which have established the rule that the determination from case to case of the amount of compensation due under the Fifth Amendment upon a taking is a judicial question the resolution of which must be confided to a court created under Art. III, § 1, of the Constitution.

3. In upholding the Commission, the Court of Appeals specifically decided that even if a taking has occurred in the circumstances of this case, the just compensation requirements of the Fifth Amendment are satisfied when Petitioners are compensated for the use of their property and the services of their officers and employees under a costing methodology required by Sec. 402(a) which results in Amtrak, a substantial user of the Hudson line by any standard, contributing insignificant amounts toward the costs incurred by Petitioners in the maintenance and operation of that line, and contributing nothing toward a return on investment. The constitutionality of mandating such a methodology for the purposes of calculating the compensation payable upon a taking has never been decided by this Court. Applied to the circumstances of this case, that methodology produces far less compensation for Petitioners than the just compensation guaranteed by the Fifth Amendment.

1. The Question Whether a Taking has Occurred.

Assuming Petitioners fall within the coverage of Sec. 402(a), that statute clearly authorizes the Commission to order Petitioner

MTA to accept Amtrak's trains over MTA's rail facilities on a continuing basis. That those facilities are held under a leasehold rather than in fee, and that the ordered use may be concurrent with MTA's own commuter use, should make no conceptual difference.[12] The ordered use is specifically authorized by an Act of Congress, is undoubtedly being exercised in the circumstances of this case for a public purpose if not a public use,[13] confers upon the benefited entity, Amtrak, the right to physically occupy someone else's property, against the latter's wishes, indefinitely, and cannot be distinguished from the ordinary taking in eminent domain of a non-exclusive permanent easement over land and improvements thereto.

The Court of Appeals nevertheless concluded that there was no taking in this case (App. 19a), but all of the cases in this Court which it cited in support of that conclusion involved the regulation of railroads, not a forced long-term physical occupancy of their lands. Perhaps aware of this, the Court of Appeals looked for precedent outside the field of railroading, but the case it regarded as most relevant, *Miller v. Schoene,* 276 U.S. 272 (1928), involved nothing more than a regulation requiring land owners to destroy cedar trees growing on their land.

In fact, there is a statutory parallel to Sec. 402(a) which has been subjected to judicial taking analysis, but the Court of Appeals did not mention that analysis in its opinion. That parallel can be found in 49 U.S.C. § 11125, which authorizes the Commission to direct a railroad to take possession of the lines of another railroad for the purpose of providing freight service thereover in any case where the latter is unable or unwilling to provide that service itself. In *Lehigh & New England Ry. Co. v. I.C.C.,* 540 F. 2d 71 (3d Cir. 1976), *cert. denied* 429 U.S. 1061 (1977), the

[12]*United States v. General Motors Corporation,* 323 U.S. 373 (1945).

[13]Amtrak is nominally a for-profit corporation, not an instrumentality of the federal government, but property taken for its use is surely taken for a public purpose within the precedents of this Court. *Berman v. Parker,* 348 U.S. 26 (1954).

Court of Appeals for the Third Circuit did indeed hold that that particular law, in its operation, does *not* effect a taking, but only after it first commented (*id.*, at 82, footnotes omitted):

> Fundamental to our holding are two conclusions: (1) that the ICC has the power to order a carrier that has not obtained a certificate of abandonment under 49 U.S.C. § 1(18) to continue to provide service for as much as 240 days, the maximum period of directed service, despite a cash deficiency or operating losses or, indeed, a court order to the contrary; and (2) that such action by the Commission would not constitute a taking for which compensation must be provided, but rather would be merely a postponement of the carrier's right to abandon.

The Third Circuit bench then proceeded to give the following specific reasons why no taking had been accomplished in the factual circumstances of that case: (a) the occupancy under the statute is temporary in nature, 240 days at a maximum; and (b) during that occupancy the owner of the occupied railroad is spared the burden of operating losses and gets the additional benefit of having his property maintained at the expense of others. Said the court, "[T]he most that the owners of a carrier suffer as a result of directed service [under 49 U.S.C. § 11125] is a postponement of their remedy of abandonment," *id.* at 84.

The differences between a directed service case under 49 U.S.C. § 11125 and this case are obvious. There is nothing temporary in Amtrak's occupancy of the Hudson line. It has used the line during the entire fifteen years of its existence and it gave no indication before the Commission in the course of the Proceeding that it intended at any time in the future, near or long-term, to discontinue that use. As for the benefits accruing to Petitioners from the use, there are none. Amtrak maintains nothing; it expects Metro-North to do that and, as will be shown, it proposes to contribute insignificant sums toward the costs Metro-North incurs in the process.[14]

[14]The Court of Appeals noted that "Amtrak had recently agreed to invest $6 million towards rehabilitation of the four-track system." App.

(Footnote continued on following page)

There is one essential difference between Sec. 402(a) and the directed service law. Section 402(a) was enacted as an essential element of a deal made between Congress and those few railroads which were still providing long-haul passenger service in 1971. Petitioners will concede that as applied to a railroad which took advantage of that deal and succeeded in ridding itself of an unwanted long-haul passenger service at the price of just a fraction of one year's deficit (*see* this Court's analysis of the practical workings of RPSA in *National Railroad Passenger Corporation v. Atchison, Topeka and Santa Fe Railway Company, supra*), Sec. 402(a) may not be a condemnation act. Such a railroad literally contracted itself into the coverage of RPSA. That is hardly the case with Petitioners. They were not party to that deal. They have never operated a long-haul passenger service nor do they have authority under state law to do so.

As an additional basis for its finding that this case does not involve a taking, the Court of Appeals engaged in the same "investment-backed expectations" analysis which this Court has employed in cases involving government regulations which approach the boundaries of confiscation. Pointedly, however, it did not discuss Petitioners' citation of *Ruckelshaus v. Monsanto Co.*, _____ U.S. _____, 104 S. Ct. 2862 (1984), where this Court proceeded to its investment-backed expectations analysis of the facts of that case only after first quoting its own observation in *United States v. General Motors Corporation, supra,* that "Governmental action *short of acquisition of title or occupancy* has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *Ruckelshaus v. Monsanto Co., supra,* 104 S. Ct. at 2874. (Emphasis sup-

(Footnote continued from previous page)
12a. It does not know that this offer was made only after MTA had complained that but for Amtrak's operations it could actually eliminate much of its trackage along the Hudson line. This complaint, voiced for years, finally generated a response, but the offer is one-shot in nature. As will be shown, Amtrak will contribute virtually nothing to the continuing cost of maintenance and operation of the line.

plied.) This case, obviously, is not one which falls "short of acquisition of title or occupancy." It goes all the way; it is a classic case of a forced, long-term occupancy. No case in this Court has ever denied that a taking has occurred in such circumstances.[16]

2. The Question Whether Congress May Authorize the Commission to Decide a Disputed Issue of Compensation.

Assuming Sec. 402(a) of the RPSA is a condemnation act as it affects Petitioners' facilities, the Court of Appeals saw no constitutional infirmity in the scheme of the Act which permits the Commission to decide a disputed compensation issue. It did not seek to distinguish *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 327 (1893), which held that "the ascertainment of [just compensation] is a judicial inquiry," nor did it seek to distinguish a number of other cases in this Court which hold that the vindication of a federal constitutional right such as the right to just compensation is the function of a constitutional court, one created under Art. III, § 1, of the Constitution and may not be delegated to an administrative agency or other form of legislative court. *Thomas v. Union Carbide,* ____ U.S. ____, 105 S. Ct. 3325 (1985); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982); *United States v. Raddatz,* 447 U.S. 667 (1980); *Crowell v. Benson,* 285 U.S. 22 (1932).

The Court of Appeals did not discuss the Art. III issue. In its view, the question whether the Commission can be authorized to resolve a disputed issue of just compensation had been settled

[16]In making its "investment-backed expectations" analysis, the Court of Appeals expressed the view that when MTA conceded the free trackage rights to Penn Central it had no expectation that it would ever be permitted to bar Penn Central or its assignees from their exercise. In view of the earlier discussion of the factual background of this case, however, it can be seen that Penn Central would have encountered strong opposition, to put it mildly, had it sought to retain its free trackage rights and, at the same time, to renounce its obligations to MTA under the related and simultaneously-negotiated service contract.

by this Court's decision in *Thompson v. Texas Mexican Railway Co.*, 328 U.S. 134 (1946). Petitioners will not dwell on the facts of that case. They are adequately summarized in the Court of Appeals' opinion, App. 18a. There are many ways in which *Thompson* can be distinguished from the instant case. For example, that case was concerned with an abandonment proceeding before the Commission, not an eminent domain proceeding. For another, the Court in that case did not even consider the Article III question. It was neither raised nor discussed. But if the Court of Appeals is correct and *Thompson* does apply, then all that has been demonstrated is that this Court's own precedents, some of which post-date *Thompson*, are in conflict on the power of administrative agencies to decide the just compensation issue. Certiorari should be granted to settle that conflict.[17]

3. The Question Whether Avoidable Costing Satisfies the Fifth Amendment.

(a) *The Essential Unfairness of Avoidable Costing.* As indicated earlier, the Commission resolved the compensation dispute between Petitioners and Amtrak by prescribing an avoidable costing methodology to determine the compensation payable to Petitioners over time and by holding that Petitioners are the dominant user for the purposes of applying that methodology. The Commission's finding of dominance was based on its conclusion that Petitioners "own and operate" the railroad and "operate more trains than Amtrak." App. 51a. It engaged in an avoidable costing analysis because it believed (as do the Petitioners) that the statute required it to (App. 50a):

> Section 402(a) provides, as pertinent, that 'In fixing just and reasonable compensation for the provision of services . . . the

[17]The Court of Appeals remarked that Judge Friendly was in agreement with it on the alleged dispositive effect of *Thompson* because he observed in his July 23, 1984, Memorandum-Order in the Special Court trackage rights action that Petitioners' argument "does not appear to us to be substantial in light of [*Thompson*]," App. 139a. Petitioners would point out to this Court that Judge Friendly was then

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> Commission shall, in fixing compensation in excess of incremental costs, consider the quality of service as a major factor in determining the amount (if any) of such compensation.' The term 'incremental' was deemed equivalent to 'avoidable.' H.R. Rep. No. 415, 93 Cong. 1st Sess. 6, 11 (1973). Thus, the proper costing standard to be used in section 402(a) proceedings is avoidable costs. By avoidable costs we mean the costs that would not be present if a minority user's service were eliminated.

To the knowledge of Petitioners, this Court has never passed on the constitutionality of basing the computation of compensation in a taking setting on avoidable costing principles. Indeed, as the use of the term "costing" in the concept clearly implies, the principle comes into play only in the rare case when someone's services are requisitioned, as opposed to just his property, and he is put to expense some or all of which, in fairness, should be reimbursed to him. To the knowledge of Petitioners, this Court has never even decided whether services may lawfully be requisitioned in an eminent domain proceeding.[18]

Assuming that services can be requisitioned, Petitioners submit that the use of avoidable costing is so palpably unfair in the circumstances of this case that it should be roundly denounced by this Court for failure to meet the standards of conduct expected and required of the sovereign under the Fifth Amendment.

To work in a railroad environment, the avoidable costing methodology requires the presence of at least two users of the same railroad and the use of one of them must somehow be more

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ruling on a motion for a preliminary injunction, that he had to act quickly, and that he was not required to decide the issue with finality. Moreover, the briefs from which he drew his conclusion did not go into the Art. III issue. *Monongahela* was cited to him, but that case never specifically identified Art. III as the foundation for its rationale and none of the other relevant cases, such as *Crowell, Raddatz* and *Northern Pipeline*, was even brought to his attention. He was in a poor position to assess *Thompson's* implications in the area of Art. III jurisprudence.

[18]The question was reserved in *United States v. General Motors Corporation, supra.*

quantitative or more qualitative than that of the others. If, for example, two users of the same railroad each day run the same number of trains of equal length and weight at the same speed, and if there is no other indicia of relative responsibility (as might be the case if one was the fee owner, or controlled the train dispatching function), then avoidable costing will not work. In the usual case, however, as here, one user's operation overshadows the other's to a greater or lesser degree and the methodology thereupon pins on him the label of 'dominant' user. Everyone else is automatically a 'minority' user, even though the ratio of dominance, measured by train frequency for example, might be 51% versus 49% rather than the 90/10 or similar ratio which is implied by the word dominant.[19]

Once a user has been labeled the dominant one, avoidable costing places on him the burden of showing by clear and specific proof the extent to which the expense (and, of course, where, as here, he is both the owner and operator of the railroad, the term changes from "the expense" to "his expense") of operation, maintenance, repair and renewal could be reduced if the minority user were to depart the premises. If he can show no specific and appreciable savings, the methodology allows him no contribution whatsoever from the minority user toward the expense of running the railroad, much less toward a return on his investment, and the minority user, literally, gets a free ride.[20] The proponents of this theory of compensation argue that there is nothing unfair in all this because the dominant user, absent an ability to demonstrate specific savings with the departure of the minority user, has

[19]The Oxford American Dictionary defines the term using phrases such as "towering over."

[20]There is an exception, of course, for expense clearly incurred for the exclusive benefit of a minority user (the so-called solely related and directly attributable costs), but that expense is seldom a bone of contention. The overwhelming bulk of costs incurred in running a railroad are of the 'common' variety; by their nature (as, for example, the replacement of worn rail) they cannot be attributed with any certainty to any single user's activities and they are therefore treated as having been incurred for the benefit of all.

proved that he is no worse off by the latter's presence. And as the Court of Appeals said in this case, ". . . one immutable principle in the law of just compensation . . . is that value to the taker is not to be considered; only loss to the owner is to be valued. *United States v. Miller,* 317 U.S. 369, 375 (1943)." App. 21a.

Petitioners submit that the Court of Appeals went too far. The faithful application of the Fifth Amendment necessarily invokes rules which from time to time transcend this "immutable" rule, as Judge Friendly pointed out in his opinion in Penn Central's Rail Act valuation case, *Matter of Valuation Proceedings,* 445 F. Supp. 994 (Sp. Ct. RRRA 1977). He there reminded the government of what was said by this Court in *United States v. Cors,* 337 U.S. 325 (1949), at 332: "The Court in its construction of the [Fifth Amendment] has been careful not to reduce the concept of 'just compensation' to a formula.", and in *United States v. Commodities Trading Corporation,* 339 U.S. 121 (1950), at 123: "This Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases. . . . [W]hen [the application of the market value rule] would result in manifest injustice to owner or public, courts have fashioned and applied other standards."

These cases demonstrate the obvious, that the touchstone of the "just" compensation clause, its principal requirement, is elementary fairness and equity.[21] Application of the avoidable costing methodology to this case is the antithesis of fairness and equity.

A compelling and, in Petitioners' view, dispositive example of this emerges from the proof Petitioners entered in the Proceeding that in 1983 (the last full year for which final data were then available) Metro-North incurred common costs amounting to $13.363 million[22] just to *maintain* that portion of the Hudson line

[21]"[T]he word 'just' in the Fifth Amendment evokes ideas of fairness and equity." *United States v. Commodities Trading Corporation, supra,* 339 U.S., at 124.

[22]Verified Statement of T.S. O'Connor of September 17, 1984, App. 178a and 167a. Amtrak disputed this figure before the Commission, but its

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lying between the lower Bronx and Poughkeepsie. Applying standard rules of avoidable costing, the Commission refused to compel Amtrak to reimburse Petitioners for any substantial part of this expense[23] for the simple reason that Petitioners could not point to specific costs which could be eliminated in Amtrak's absence. Yet it could not be denied by the Commission that this entire section of the line was used in common by both the commuter service and Amtrak's long-haul service during the whole of 1983. If Amtrak had been required to share in this expense in proportion to its relative use of the section during that year, Petitioners' proof (App. 158a) showed that depending on whether one chose as the basis for allocation relative gross-ton miles, relative car miles

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objection was principally on the ground that it included elements incompatible with avoidable costing theory. Thus, it insisted that $3.645 million be eliminated because this expense was incurred in maintaining communications and signal systems, a cost "which [does] not enter into the . . . [Commission's] formula for determining avoidable maintenance of way expenses." Another $1.321 million should be eliminated, Amtrak argued, because it impermissibly represented a pro rata portion of Metro-North's "overhead expenses", Amtrak's label for Metro-North's main office expense, principally the salaries of white collar supervisory and administrative personnel supporting the maintenance function. Reply Verified Statement of Edward F. Strain dated September 26, 1984, at 7 and 8. The fact is that the railroad simply could not run without these communication and signal systems and without the services of these white collar officers and employees, and Amtrak benefits directly from those systems and services whenever it uses the Hudson line. Amtrak's principal objections to the $13.363 million figure go to the heart of the compensation dispute and raise the basic question, should it be allowed to use someone else's property and personnel while sharing in just a minute fraction of the latter's costs on the principle that those costs would have to be incurred even if Amtrak's trains were not present and Amtrak's relative benefit from the incurrence of those costs is therefore irrelevant.

[23]Its avoidability rules notwithstanding, the Commission employs a compensation formula called the Speed Factored Gross Ton formula which requires some contribution by a minority user toward a limited amount of the dominant user's common costs. In this case that formula, according to Amtrak's calculations, produces the sum of $172,309 for

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or relative train miles,[24] Amtrak would have to contribute, respectively, $2.726 million (20.4%), $2.125 million (15.9%) or $3.167 million (23.7%).[25] The difference between avoidable costing, which by Amtrak's calculations produces a contribution of $172,309 for 1983, and a costing system which allocates common costs, based on the allocation factor most favorable to Amtrak and applied to just the cost of *maintaining* this section of the Hudson line, is literally in excess of twelve orders of magnitude![26]

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1983 for this same stretch between the lower Bronx and Poughkeepsie. *See* Verified Statement of W.W. Whitehurst of April 13, 1984, at 11. The Court of Appeals mistakenly believed that Petitioners "do not complain about the [SFGT] formula", App. 24a. Petitioners' briefs before both the Commission and the Court of Appeals described the formula's contribution as "insignificant", so small as not to deserve analysis.

[24]Historically, the Commission has imposed or sanctioned a number of formulas for allocating common costs among multiple users of a single line of railroad on the basis of usage. The three mentioned here are primary among that group. The respective virtues and drawbacks of various formulas are discussed by the Commission in *Chicago South Shore, Trackage Rights*, 307 ICC 329 (1959), and by Judge Friendly in *Matter of Valuation Proceedings*, 531 F. Supp. 1191 (Sp. Ct. RRRA 1981), at 1341-1346. The percentages of relative use given above are based on daily records which are not subject to any serious question.

[25]These sums also give some indication of the great value of Conrail's free trackage rights, contradicting the Court of Appeals' suggestion that Petitioners' leasehold is not supported by adequate consideration. App. 19a. Conrail's local freight service used this same segment in common with the commuter and long-haul services during the whole of 1983. Had it contributed to this $13.363 million expense on the basis of gross-ton miles, car miles or train miles, its percentages would have been 45.6%, 50.8% and 7% respectively. App. 158a.

[26]It will be argued that this gap can be reduced by bonuses which are made available to Petitioners. Section 402(a) permits (although it does not require) the granting of bonuses for good performance. In this case, the bonus formula prescribed by the Commission, App. 67a, 71a, could theoretically amount to as much as $1.086 million a year, according to the advice of Petitioners' experts, if Petitioners met all of Amtrak's demands (including possible demands for substantial capital improvements). By the same token, if Petitioners failed miserably in their

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These figures show how great a free ride Amtrak is enjoying. Petitioners are absorbing costs[27] which Amtrak in all fairness should share.

The basic reason for this tremendous disparity arises from the fact that we are dealing here with an operating railroad and, more importantly, one geared to accommodate passenger trains. Such a railroad is necessarily an expensive proposition to operate and maintain and the amount of that expense is relatively impervious

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performance, or if they could not fund the required capital improvements, they could earn nothing under the formula, even though that failure arose from circumstances over which Petitioners had no control. As a consequence, Petitioners have disregarded any potential a bonus might have for providing funds in substitution for the amount Amtrak would have to contribute under any system for determining compensation which allocated common costs. In Petitioners' view, if property is taken in eminent domain, and if that 'property' consists in the main of personal services provided to the sovereign or its designee, as is the case here, the right of the condemnee to receive just compensation cannot be made to depend upon factors which have no relation to essential fairness. Petitioners operate their own commuter service over the Hudson line and are therefore motivated to run the line well. As a consequence, the most likely cause for doing a poor job (or for being unable to finance a capital improvement) would be a shortage of available funds (a chronic problem with public agencies, like Petitioners, which must rely upon public subsidies to make ends meet), and that should not be used as an excuse to reduce or deny a sum otherwise payable upon a taking.

[27]The 1983 costs used in the example are all common costs. The Court of Appeals mistakenly believes that such costs are nothing more than "overhead costs of ownership" (App. 21a). The fact is those costs reflect payroll costs, costs of material and very little else. In particular, they reflect no depreciation and no return on investment, the two elements which are usually included in the concept of ownership 'costs'. Also, as indicated, they do not include the substantial costs incurred in the *operation* of the section, as opposed to its maintenance. Operation costs would include such items as the salaries of train dispatchers and the tower operators who control the switching function. *See*, generally, the verified statement of Petitioners' expert witness, Mr. O'Connor. App. 142a *et seq.*

to train frequency. It takes no expert knowledge to appreciate the truth of this statement. Whether there are twenty trains a day operating over a line of railroad or two hundred, the fact that they carry passengers mandates a standard of care and a level of expenditures which are roughly the same in either case.[28] This was the obstacle Petitioners faced under avoidable costing rules. They could show no specific savings absent Amtrak; and had the usage split been different and Amtrak's trains constituted not, say, 23.7% of all train miles between the lower Bronx and Poughkeepsie but a full 50%, the situation would not have been appreciably different. Any rule of compensation which countenances such arbitrary treatment contravenes the essential requirement of the Fifth Amendment that the rules applied in its enforcement must afford the condemnee elementary fairness.[29]

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[28]An obvious exception to this generality would be the case where in the absence of one of the users drastic reductions in the size of the capital plant could be achieved. Petitioners offered proof of this nature in the Proceeding but it was rejected by the Commission.

[29]Avoidable costing is a relatively new technique for 'sharing' costs. Amtrak is not the only agency which has benefited from the methodology. Between 1976 and 1983 Congress gave local commuter authorities (other than MTA and Connecticut) the benefits of avoidable costing when using the federally-chartered Conrail's lines. Rail Act, Sec. 304(c)(2)(A); 45 U.S.C. § 744(c)(2)(A). Until April of this year Amtrak also had to suffer under the technique, as a dominant user, when other railroads and commuter authorities wished to use Amtrak's own railroad, the Northeast Corridor. *See*, last three sentences of Sec. 402(a) of the RPSA, 45 U.S.C. § 562(a), as interpreted and applied by the Commission in its proceeding entitled *Ex Parte 417*, decided March 3, 1983, 367 I.C.C. 192, under the directive of Sec. 1163(a)(1) of NRSA. Congress put a partial end to this free ride at Amtrak's expense on April 8, 1986, by the enactment of Sec. 4017(b) of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). This law amends Sec. 402(a)'s last three sentences to require freight railroads proposing to use the Northeast Corridor to pay their usage-based proportion of all of Amtrak's common costs, this without regard to which user is in fact the dominant user. Ironically, as a consequence of this amendment Sec. 402(a) of RPSA now declares, without regard to dominance, that avoidable costing (in which the sharing of common costs is specifically

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b. The Inappropriateness of Applying Avoidable Costing Rules in Eminent Domain

The 'no-worse-off' theory of avoidable costing bears a deceiving similarity to one of the cardinal rules of eminent domain that the just compensation clause demands indemnification and nothing more. The essential difference appears, however, when one reads Judge Friendly's opinion in *Matter of Valuation Proceedings*, 445 F. Supp. 994 (Sp. Ct. RRRA 1977), where the development of the indemnity theory is examined.

Historically, the struggle between condemnor and condemnee has included as a basic element the effort of the condemnee to include in the *valuation* process an increment related not to the value of the property taken as such but rather to the condemnor's need for the property, an increment sometimes referred to, appropriately if not accurately, as hold-up value. This Court has uniformly rejected those efforts. *Id.*, at 1013-1016, citing cases in this Court. Consistent with this rejection, when the value of property taken in eminent domain is measured by its market

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ruled out) produces "just and reasonable" compensation when Amtrak wishes to use the lines of freight railroads (MTA's railroad included), but when a freight railroad wishes to use Amtrak's lines this very same Sec. 402(a) declares, again without regard to dominance, that "equitable and fair" compensation to Amtrak requires that it be given the benefits of an allocation of its common costs. This Court in the past has regarded "just and reasonable" and "fair and equitable" as "congruent standards", *New Haven Inclusion Cases*, 399 U.S. 392 (1970), but Congress, which is well aware of the financial gulf separating avoidable costing from fully allocated costing (*see* debates preceding COBRA's enactment, Congressional Record-Senate for October 23, 1985, at S13896), obviously disagrees. Petitioners submit that the enactment of Sec. 4017(b) of COBRA strongly supports the wisdom of the rule of *Monongahela* that the ascertainment of just compensation under the Fifth Amendment should be a "judicial inquiry", not a legislative one.

value, this Court requires that the condemnor be excluded from the market. The rationale is well put by Judge Friendly (*id.*, at 1015):

> "The essence of eminent domain is not only that it enables the condemnor to acquire property which the condemnee may not wish to sell but that it allows the condemnor to do this at a cost determinable in accordance with some external standard rather than by hypothesizing a bargaining process in which the condemnor's needs are an element and there is simply no way of determining the point where the bargain would ultimately be struck."

Where the government requisitions services, however, rather than land, the concept of the *value* of what has been taken is not even considered; condemnor and condemnee automatically (and justifiably) assume that compensation will be determined by some formula which revolves around costs, not 'value'. There is no concern that the condemnee will increase his costs to build up the compensation award because it can only produce a wash.

In short, the concept of value, the slippery nature of which has prompted this Court to develop the rule of indemnity along with other allied rules intended to protect the public purse, is not even involved in the instant case.[30] Those rules have no relevance here. The rules which do have relevance here are the rules which this Court has developed in the field of public utility regulation, because it cannot be denied that the essential thrust of Sec. 402(a) of RPSA, if it does include Petitioners in its coverage, is to requisition the services of Petitioners in aid of Amtrak, which is itself rendering a public service, and thereby to impress them into the federal public service.

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[30]The obvious exception to this statement, the determination of a proper return on investment, which necessarily draws values into question, is discussed *infra*.

Land is necessarily involved whenever an enterprise is subjected to regulation and converted to public utility status, but the driving governmental motivation, always, is to regulate what is going on on that land, to see that the benefits of that activity are enjoyed by the public without discrimination and to insure that those benefits are not unfairly priced. The situation here is no different. Amtrak is not looking for an easement over unimproved land, the kind of easement which contemplates the making (and subsequent maintenance) of improvements by the grantee of the easement; it wants MTA and Metro-North to provide those improvements, to operate them and keep them in good repair, and to guide Amtrak's trains safely thereover to their assigned destinations.

Once this reality is recognized, the absurdity of applying principles of avoidable costing becomes evident. Assuming the costs a public utility incurs in its operation are not improvident (and no complaint of that nature has been raised in this case), it is hornbook law in this country that the utility is entitled to recover those costs from its customers. There may be questions regarding the return on investment the utility proposes to tack on top, and here we have seen the courts traveling the gamut from *Smyth v. Ames*, 169 U.S. 466 (1897), to *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), to *Market Street Railway Company v. Railroad Commission* 324 U.S. 548 (1945), with regard to the proper base against which the percentage rate of return on investment is to be applied,[31] but always, at a minimum, the regulated utility is permitted as a matter of constitutional right under the Fifth Amendment to recover its costs of service.[32] And in enforcing that right no

[31]In this case Petitioner MTA suggested depreciated book, but the Commission denied it any return on investment, holding that the rules of avoidable costing permit this only where it can be shown that major items of capital plant can be retired upon the withdrawal of the minority user.

[32]*See F.P.C. v. Natural Gas Pipeline Company*, 315 U.S. 575 (1942), *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1943), *F.P.C. v. Memphis Light, Gas and Water Div.*, 411 U.S. 458(1973).

court, to the knowledge of Petitioners, has ever sustained the claim that a particular ratepayer is entitled to be exempted from contributing toward that recovery because absent his owns demands for service the utility would have had to incur essentially the same expense to build and operate its capital plant anyway and it is therefore 'no worse off' by that ratepayer's presence.

Amtrak wants service but it does not want to pay for it. It wants Petitioners to charge discriminatory rates against their other 'ratepayers', these being, of course, their commuters and their subsidizing New York State taxpayers,[33] forcing those people to assume a financial burden which should in all fairness be Amtrak's. That is what this case comes down to.

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[33]The Court of Appeals thought it was ironic that a state agency which is the recipient of federal aid should be in federal courts seeking just compensation particularly when it has obtained a "sixty-plus (sic) year lease of railroad property at a nominal rate." App. 19a. It has already been shown herein how much MTA has conceded by way of consideration under that lease in the form of free trackage rights. Moreover, Petitioner's Reply Brief before the Court of Appeals gave this further information regarding that lease which negates the concept that it lacked consideration: that MTA's fixed rental obligation alone in 1984 was $440,773.72; that the lease is completely net, requiring MTA to pay all capital and operating expense; that the lease extends vertically to no higher than 22 feet from top-of-rail; and that MTA loses its lease if it steps out of the commuter railroad business, a business which caused MTA a cash loss of $212 million in the operation of the Harlem-Hudson service in 1984 alone. As for the Court of Appeals' observations regarding the acceptance of federal aid, Petitioners took that into account before they resorted to the courts but they nevertheless concluded that they had an obligation to their commuters and to New York State taxpayers to press on. The New York State taxpaying public is paying 48.3% of MTA's gross operating expense each year, its commuters are paying another 41.3% and the federal government is contributing 2.6%. *See* MTA's official statement dated July 1, 1984, published in connection with the issuance of $50 million Commuter Facilities Revenue Bonds.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 559—August Term, 1985

(Argued December 16, 1985 Decided June 4, 1986)

Docket No. 85-4141

METROPOLITAN TRANSPORTATION AUTHORITY and METRO-NORTH COMMUTER RAILROAD CO.,

Petitioners,

—v.—

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents,

NATIONAL RAILROAD PASSENGER CORP.,

Intervenor.

Before:

OAKES, KEARSE, and PIERCE,

Circuit Judges.

Petition for review of three decisions of the Interstate Commerce Commission determining compensation for trackage rights pursuant to section 402(a) of the Rail Passenger Service Act. Constitutional and statutory challenges to ICC decisions rejected. Petition denied.

ROBERT R. PRINCE, Stamford, CT (Robert M. Lustberg, New York, NY; Walter Zullig, General Counsel, Metro-North Commuter Railroad Co., New York, NY, of counsel), *for Petitioners*.

LOUIS MACKALL, Attorney, Interstate Commerce Commission, Washington, DC (Douglas H. Ginsburg, Assistant Attorney General, Department of Justice, John J. Powers, III, John P. Fonte, Attorneys, of counsel;

ROBERT S. BURK, General Counsel, ICC, Henri F. Rush, Deputy General Counsel, of counsel), *for Respondent Interstate Commerce Commission*.

STEPHEN C. ROGERS, Washington, DC (Peter S. Craig, Frederick C. Ohly, Washington, DC, of counsel), *for Intervenor National Railroad Passenger Corp.*

OAKES, *Circuit Judge*:

This case concerns questions of the applicability and constitutionality of acts of Congress pertaining to certain rail passenger services as well as questions whether the Interstate Commerce Commission (ICC or Commission), respondent here, has jurisdiction to determine the compensation owed by the National Railroad Passenger Corporation (Amtrak), intervenor here, to the New York Metropolitan Transportation Authority (MTA) and its wholly-owned subsidiary Metro-North Commuter Railroad Company (Metro-North) (jointly referred to as Metro), petitioners here, for Amtrak's use of certain facilities and services of the petitioners and whether the determinations that the ICC made were proper. Resolution of these questions involves examination of the tortuous collation of statutes pertaining to Amtrak, including the relevant sections of the Rail Passenger Service Act of 1970 (RPSA), 45 U.S.C. §§ 501-658 (as amended),[1] and to Metro-North, which by virtue, inter alia, of the Northeast Rail Service Act of 1981 (NRSA), Pub. L. No. 97-35, 95 Stat. 643 (codified as amended in scattered sections of 45 U.S.C.), now operates a commuter rail service formerly operated by the Penn Central Transportation Company (Penn Central), and from 1976 through 1982, by Penn Central's federally-funded successor in interest, Consolidated Rail Corporation (Conrail), which was statutorily constituted pursuant to the Regional Rail Reorganization Act of 1973 (3R Act), Pub. L. No. 93-236, 87 Stat. 985 (codified as amended in scattered sections of 45 U.S.C.).

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1. All citations to the United States Code are to the 1982 edition unless otherwise indicated.

The case also requires our consideration of, among other things, the tortured history by which the seventy-four miles of lines in question between Poughkeepsie, New York, and Grand Central Terminal (GCT) in New York City (the Harlem-Hudson Line), as well as the GCT facility itself, came to be leased originally to MTA by Penn Central in 1972, the latter reserving certain rights, however, to Amtrak and to itself. Penn Central's rights were in turn later assigned in part to Conrail. In our trek through these statutes and this history we are aided no end by the previous opinions of the Special Court, Regional Rail Reorganization Act (the Special Court), 45 U.S.C. § 719(b), which (a) declined to stay the instant Commission proceedings, *Consolidated Rail Corp. v. Metro-North Commuter Railroad Co.*, C.A. No. 83-14 (Regional Rail Reorg. Ct., July 23, 1984) (*Conrail I*) (holding (1) section 402(a) of RPSA, 45 U.S.C. § 562(a), facially applicable to Amtrak's trackage rights over the lines in question, (2) a Fifth Amendment constitutional argument insubstantial, (3) section 504(f) of RPSA, added by section 1137 of NRSA, 45 U.S.C. § 584(f), inapplicable, and (4) declining to exercise any power under the All Writs Act, 28 U.S.C. § 1651, in order to preserve its jurisdiction); and (b) in a proceeding related to this one held that the free trackage rights and rights to GCT (collectively "trackage rights") retained by Penn Central in its 1972 leases to MTA devolved upon Conrail and, to a limited extent, upon Amtrak and remain in full force and effect despite Conrail's ceasing as of January 1, 1983, to furnish commuter services on the lines in question and despite the enactment of section 504(f) of RPSA, *see Consolidated Rail Corp. v. Metro-North Commuter Railroad Co.*, 598 F. Supp. 1571 (Regional Rail Reorg.

Ct. 1984) (*Conrail II*). With that aid, as well as with a careful independent examination of the historical facts, statutes, and claims involved, we deny the petition to review.

STATEMENT OF FACTS

Because rail passenger service was deteriorating throughout the nation, Congress enacted the RPSA in 1970. The RPSA created Amtrak and provided for its assumption of nearly all "basic system" intercity passenger service obligations. *See Congress of Railway Unions v. Hodgson*, 326 F. Supp. 68, 70 (D.D.C. 1971). Under section 401 of RPSA, 45 U.S.C. § 561, railroads were permitted to terminate their responsibility to provide intercity rail passenger service without filing an application for discontinuance with the ICC; they could, instead, contract with Amtrak, at least until Amtrak's authority to enter such contracts expired in 1975.

Amtrak continues to have authority under section 402 of RPSA, 45 U.S.C. § 562, to "contract with railroads or with regional transportation agencies for the use of tracks and other facilities." If the parties cannot agree, section 402(a), the critical statutory provision involved in this case, gives the Commission the authority, if necessary to accomplish the purposes of RPSA, to prescribe compensation to be paid by Amtrak for the use of such tracks and facilities. That subsection provides that such compensation is in general to be limited to "incremental costs"; the "quality of service" is the principal factor that can lead to an award of compensation in excess of those costs. "Incremental costs," all parties to this case agree, are the same as so-called "avoidable costs," i.e., the costs

of the carrier whose facilities are being used that would be avoidable except for Amtrak's use. These are as opposed to "fully-allocated" or "fully-distributed" costs, which are equal to the total costs of maintenance, operation and repair of a line or facilities, and to a return on investment, in basically the same proportion as the respective carriers use the facilities. It is self-evident that Metro wishes to get out from under the application of section 402(a) so that it can receive fully-allocated costs.[2]

The relationship that led to the controversy before us can be traced back to 1972, when MTA, which, like its subsidiary Metro-North, is a New York state public benefit corporation, *see* N.Y. Pub. Auth. Law §§ 1263(1), 1266(5) (McKinney 1982), entered into an arrangement with Penn Central concerning the latter's Harlem-Hudson service. This arrangement enabled MTA to obtain full control over a substantial part of Penn Central's tracks, terminals, stations, shops, and yards by a single lease, the so-called Harlem-Hudson Lease. The lease covered both GCT and the whole of the Harlem and Hudson Lines. It was for a term of sixty years with various rights of renewal permitting it to run up to an additional thirty years. The rent that MTA agreed to pay Penn Central was

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2. The cost base against which each methodology is applied is made up of three components: "solely related costs," such as the salary of a Metro-North dispatcher assigned full-time to watch over the operation of Amtrak trains; "directly attributable costs," such as the wage of a Metro-North mechanic who keeps a log of the specific number of hours he works on Amtrak cars in need of temporary repairs and those he devotes to MTA equipment; and "common costs," those which by their very nature cannot be identified as benefitting just Amtrak or MTA trains or Conrail's, e.g., a fixed common cost that does not vary as a result of usage, such as the cleaning of a culvert under the track, or a variable common cost that depends on the amount of usage, such as replacing worn track. *See Southeastern Pa. Transp. Auth. v. ICC*, 644 F.2d 238, 244-45 (3d Cir. 1981).

nominal, but the agreement made MTA eligible for substantial federal aid and rehabilitation. *See* 49 U.S.C. app. § 1602(a). Although Penn Central was then in the process of transferring responsibility for its long-haul passenger services to the newly-created Amtrak, it reserved certain rights under the lease, including the right to continue to operate its freight and long-haul passenger services over the leased properties and all rights necessary to enable Penn Central to perform its obligations and Amtrak to exercise its rights under an April 16, 1971, agreement between Amtrak and Penn Central. Penn Central was required to pay MTA if its traffic exceeded a certain level and to pay various other costs. In a separate but simultaneous agreement, MTA contracted with Penn Central to underwrite the latter's losses on its Harlem-Hudson commuter service.

In accordance with the Final System Plan (FSP), drafted by the United States Railway Association (USRA) pursuant to section 206 of the 3R Act, 45 U.S.C. § 716, and approved by Congress in section 601(e) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), 45 U.S.C. § 718(d)(1) (adding § 208(d) to 3R Act), *see Penn Central Corp. v. Consolidated Rail Corp.*, 611 F. Supp. 285, 291 n.5 (Regional Rail Reorg. Ct. 1985), Penn Central's trackage rights and its commitment to provide commuter services were assigned to Conrail on April 1, 1976. The FSP required a scaled-down Penn Central system and compelled Penn Central for value to convey that system to Conrail. The FSP left Penn Central as fee owner of the properties subject to MTA's long-term lease and USRA simply designated Penn Central's Harlem-Hudson trackage rights for transfer to Conrail. On the same day that Conrail received these rights from

Penn Central—April 1, 1976—Conrail transferred to Amtrak other long-haul passenger train rights, but not the Harlem-Hudson commuter train rights. Conrail and Amtrak continued to exercise the trackage rights reserved in the Harlem-Hudson Lease for freight and long distance passenger service. *See Conrail II*, 598 F. Supp. at 1576-77.

In 1981 Congress adopted the NRSA. Section 1133(2) of that Act, 45 U.S.C. § 1102(2), provided for the transfer of Conrail's commuter service responsibilities to other entities. Sections 1137 and 1145 of NRSA also added a new title to RPSA, Title V, sections 501-10, 45 U.S.C. §§ 581-91 (as amended), authorizing the creation of a wholly-owned subsidiary of Amtrak known as Amtrak Commuter Services Corporation (Amtrak Commuter) whose primary function was to provide certain commuter services formerly provided by Conrail. New section 506(a) of RPSA, 45 U.S.C. § 586(a), required each local commuter authority to notify Amtrak Commuter and Conrail by April 1, 1982, whether it intended to operate its own commuter service or to contract with Amtrak Commuter for such service. MTA elected not to use Amtrak Commuter. It instead organized its subsidiary Metro-North, which began operations January 1, 1983, the day that Conrail's commuter service obligations terminated.

In *Conrail II*, which involved questions of the nature of Conrail's and Amtrak's rights and obligations under Penn Central's lease of its West End properties (the New Haven line) and of Conrail's rights and obligations under the Harlem-Hudson Lease into which Penn Central had entered, MTA argued to the Special Court that Conrail lost its free trackage rights when it stopped providing commuter services. MTA maintained that, after January 1, 1983, Conrail and Amtrak had an obligation to con-

tribute their share of the costs of maintenance, operation, and repair of the MTA lines, including GCT. The Special Court held that Penn Central's leases to MTA reserved rights to Penn Central, that, as discussed above, those rights had been assigned to Conrail and Amtrak, and that they were not extinguished by the statutory termination of Conrail's duties to provide commuter services. 598 F. Supp. at 1582-83.

This case concerns a matter not at issue in *Conrail II*: the compensation that Amtrak owes for its use of Harlem-Hudson Line trackage rights and for the use of facilities and services associated with that line. *See id.* at 1578 n.3. *Conrail II* involved free trackage rights that had passed from Penn Central to Amtrak and Conrail pursuant to the 3R Act and the FSP. Since the Hudson portion of the Harlem-Hudson Line was not in the Northeast corridor, the 3R Act and the FSP did not give Amtrak free trackage rights over that line. Amtrak does not dispute that it must pay for use of the line. The question is how much.

After failing to reach agreement with Metro over compensation for its use of the line and associated services and facilities, Amtrak filed the instant petition before the Commission requesting that compensation be set pursuant to section 402(a) of RPSA, 45 U.S.C. § 562(a). MTA and Metro-North then filed a motion asking the Special Court to enjoin the Commission proceeding. They claimed, as they do here, that section 402(a) does not apply to them, but that if it does that section is unconstitutional, and that the Special Court, not the Commission, has exclusive jurisdiction to fix compensation for trackage rights. The Special Court, as noted above, denied the stay request in *Conrail I*.

The Commission itself has made three decisions on Amtrak's petition, review of which is sought here. The first, dated July 27, 1984, denied Metro's motion to dismiss on the basis that section 504(f) of RPSA, 45 U.S.C. § 584(f), did not preempt Amtrak's option to obtain trackage rights under section 402(a), and it did not bring into effect section 1152(a)(1) of NRSA, 45 U.S.C. § 1105(a)(1), which provides that the Special Court has exclusive jurisdiction "over any civil action" brought pursuant to the provisions of NRSA. Rather, the Commission agreed with Amtrak that, since the petition was not a "civil action," the clear statutory basis for the Commission's jurisdiction over the application was section 402(a) of RPSA. The Commission noted that section 402(a) orders have routinely been reviewed in the United States Courts of Appeals. *See, e.g., National Railroad Passenger Corp. v. ICC*, 610 F.2d 881 (D.C. Cir. 1979).

In the Commission's second decision, dated October 25, 1984, it reaffirmed the holding that section 402(a) gives it jurisdiction to set terms for the use of trackage and facilities. In reaching this conclusion, the Commission found that Metro was a regional transportation agency providing rail passenger service. It also rejected the contention that section 402(a) applied only to intercity rail passenger carriers that took advantage of the discontinuance provision of section 401 of RPSA, 45 U.S.C. § 561, and cited its own decision holding otherwise, *Penn Central Transportation Co.—Compensation for Passenger Service*, 342 I.C.C. 765, 767-68 (1973). The ICC rejected the argument that the transfer of trackage rights to Amtrak under the 3R Act, the FSP, and the 4R Act demonstrates that section 402(a) applies only to intercity rail passenger carriers that terminated service pursuant to

section 401. It disposed of Metro's contention that section 402(a) violates the Fifth Amendment by suggesting that 402(a) does not represent a taking since Metro still has a right, albeit non-exclusive, to use its property, and by adding that Metro's claim of unconstitutionality was premature since Metro could secure judicial review after the rate was set. *See* 28 U.S.C. §§ 2321(a), 2342(5) (1982 & Supp. II 1984). The Commission also found meritless Metro's claim that only a court can establish constitutionally required compensation, citing *Bauman v. Ross*, 167 U.S. 548, 593 (1897). The Commission also ruled that the Tenth Amendment as interpreted in *National League of Cities v. Usery*, 426 U.S. 833 (1976), did not make section 402(a) an unconstitutional infringement of state sovereignty rights since it involves matters traditionally entrusted to the federal government, citing *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678 (1982). It then rejected Metro's attempt to secure compensation retroactively for the period beginning April 1, 1976; the Commission held that under *National Railroad Passenger Corp. and Union Pacific Railroad Co.*, 348 I.C.C. 926, 935-37 (1977), it could not award retroactive compensation for the period before the date on which both parties agreed compensation had begun to be owed, i.e., January 1, 1983. Finally, it held that the proper costing standard to be used was avoidable costs. *See Costing Methodologies for the Northeast Corridor: Commuter Service*, 367 I.C.C. 192 (1983).

The third Commission decision, dated July 5, 1985, prescribed a general methodology for determining compensation but did not calculate the specific dollar amount. The Commission also disposed of a number of specific claims advanced by Metro to secure additional

payments. Thus, it found that Metro could not charge Amtrak for the use of space and facilities at GCT since the space and facilities in question were reserved from the Harlem-Hudson Lease, and therefore Metro had no ownership or leasehold rights. The Commission also rejected the argument that, but for the presence of Amtrak, Metro would be able to reduce from four to two the number of tracks on the twenty-nine miles of the Harlem-Hudson Line between Spuyten Duyvil and Croton-Harmon. This holding was based on the finding that Metro had not shown that it had the permission of the lessor Penn Central or the trackage rights user Conrail to make the necessary modifications. The Commission also noted that Amtrak had recently agreed to invest $6 million towards rehabilitation of the four-track system. The Commission also reasserted the propriety of its jurisdiction under section 402(a), stating that it had recently found Metro-North to be a railroad for purposes of 49 U.S.C. Subtitle IV in *Metro-North Commuter Railroad Co.—Exemption from 49 U.S.C. Subtitle IV,* Finance Docket No. 30063 (Nov. 24, 1982), and hence it is a railroad under section 402(a).

DISCUSSION

I. *Applicability of Section 402(a)*

Petitioners make three arguments to the effect that section 402(a) is inapplicable to them: (1) They are not railroads or regional transportation agencies within the meaning of RPSA; (2) section 402(a) applies only to carriers that have avoided their passenger service obligations under section 401, i.e., sections 401 and 402(a) are

interdependent; and (3) section 402(a) was superseded by NRSA's addition of section 504(f) to RPSA. Each of these contentions is untenable.

Section 103(15) of RPSA, 45 U.S.C. § 502(15), defines a regional transportation agency as an "authority, corporation, or other entity established for the purpose of providing passenger service within a region." MTA surely falls within that definition. Indeed, 45 U.S.C. § 502(8) specifically includes MTA on a list of "[s]tate, local, or regional authorit[ies]" established for the purpose of providing commuter service. Moreover, 45 U.S.C. § 502(9) defines "commuter service" as "short-haul passenger service." Metro-North is also a "railroad" or "rail carrier" as those terms are defined in 45 U.S.C. § 502(14), since it provides railroad service for compensation. It is immaterial to Metro-North's status as a railroad that the Harlem-Hudson Lease is held by MTA and not by Metro-North; both owner and operator are carriers. *See Conrail Abandonment in Jeannette, Pa.*, 366 I.C.C. 384, 387 (1982).

The argument that sections 401 and 402(a) are interdependent and that section 402(a) applies only to carriers that terminated service pursuant to section 401 is similarly lacking in merit. The two sections function separately and serve different purposes. Section 401 applies only to railroads, while section 402(a) covers both railroads and regional transportation authorities. Congress did not limit Amtrak applications to the ICC under section 402(a) to those involving railroads that have used section 401, as it easily could have done had it wished to do so. Section 401 provides relief for railroads; section 402(a) assures that

Amtrak has available necessary facilities to carry out the purposes of RPSA.[3]

We also reject the argument that the transfer of rail trackage rights to Amtrak in the 3R Act, the FSP, and the 4R Act demonstrates a congressional belief that the MTA lines did not fall within the coverage of section 402(a). MTA specifically claims that when Congress adopted the 3R Act in 1973 it decided to protect the Harlem-Hudson Lease by having Conrail assume it, section 303(b)(2), 45 U.S.C. § 743(b)(2); that the USRA implemented this decision in the FSP by requiring Conrail to assume the contract; and that the USRA also implemented that decision by designating for transfer to Conrail Penn Central's free trackage rights for long-haul passenger service and freight service. MTA also notes that before the 3R Act's April 1, 1976, conveyance date Congress amended section 206(c)(1)(D) of that act by passing section 607(j) of the 4R Act to permit Congress to pipe through to Amtrak the reserved free trackage rights for long-haul passenger service over the Harlem-Hudson Line and into GCT. *See* 45 U.S.C. § 716(c)(1)(D) (relevant section as amended). MTA's argument is that, if Amtrak could assert rights under section 402(a) over the property of all rail carriers, then Congress would not have taken these various steps. We think, however, that the USRA

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3. The Commission has consistently applied section 402(a) to all railroads. *See Minnesota Transfer Ry. Co.*, 354 I.C.C. 552, *modified*, 354 I.C.C. 769 (1978); *National R.R. Passenger Corp. & Terminal R.R. Ass'n*, 348 I.C.C. 901 (1977), *aff'd sub nom. National R.R. Passenger Corp. v. ICC*, 610 F.2d 865 (D.C. Cir. 1979); *Amtrak & Texas & Pacific Ry. Co.*, 348 I.C.C. 645 (1976), *aff'd in relevant part sub nom. National R.R. Passenger Corp. v. ICC*, 610 F.2d 865 (D.C. Cir. 1979); *Amtrak & Washington Terminal Co.*, 348 I.C.C. 86 (1975), *modified*, 348 I.C.C. 859 (1977), *aff'd sub nom. National R.R. Passenger Corp. v. ICC*, 610 F.2d 881 (D.C. Cir. 1979).

and Congress were more concerned with the task of redesigning the freight rail system in the Northeast and implementing the FSP by conveyance of thousands of miles of rail line and related facilities from Penn Central and other bankrupt rail systems to Conrail rather than with the precise relationship of section 402(a) to the designation of trackage rights on the Harlem-Hudson Line and Amtrak's role in respect thereto. Section 402(a) permits, as the Commission pointed out, only a piecemeal approach; the 3R Act, the FSP, and the 4R Act represented an effort to resolve a crisis in rail transportation in the Northeast Corridor through major restructuring. Congress neither amended nor repealed section 402(a) after the restructuring accomplished by the 3R Act, the FSP, and the 4R Act, and the section continues to play a necessary role in facilitating Amtrak's operations.

The petitioners make a complex argument in respect to section 1137 of NRSA, which added section 504(f) to RPSA, 45 U.S.C. § 584(f). That subsection is set forth in the margin.[4] MTA claims that section 504(f) "inescapably" refers only to the financial support arrangements pertaining to the Harlem-Hudson and New Haven Lines and that it indicates that Congress intended Amtrak and Conrail to have and enjoy a trackage right not limited in time over MTA leaseholds included in those arrange-

4. Section 504(f) of RPSA provides:

> Amtrak Commuter shall not be subject to any lease or agreement with a commuter authority under which financial support was being provided on January 2, 1974, for the continuation of rail passenger service, except that the Corporation and Conrail shall retain appropriate trackage rights (for passenger and freight operations respectively) over any rail properties owned or leased by such commuter agency. Compensation for such trackage rights shall be just and reasonable.

45 U.S.C. § 584(f).

ments. MTA maintains that an "[e]qually inescapable" conclusion is that for these easements MTA was to be paid "just and reasonable" compensation, not limited to reimbursement of its incremental costs, and that the Commission was to play no part in determining the amount of the compensation, *cf. Lehigh & New England Railway Co. v. ICC*, 540 F.2d 71, 78 (3d Cir. 1976) (Commission's regulatory jurisdiction statutory only), *cert. denied*, 429 U.S. 1061 (1977). MTA contends that Congress would not have created a trackage right in 1981 for Amtrak's benefit over the Harlem-Hudson Line into GCT if MTA's facilities were already subject to Amtrak's demands for service under section 402(a) of RPSA. The Commission rejected this argument, holding that section 504(f) was intended to come into play only if MTA hired Amtrak Commuter to take over the Harlem-Hudson Commuter Service in place of Conrail, and that since MTA had chosen to create Metro-North to perform that function the subsection was inapplicable. When it refused to enjoin the ICC proceedings, the Special Court implicitly rejected MTA's position that because section 504(f) was controlling the Special Court had exclusive jurisdiction. Section 504(f) was discussed in depth in Judge Friendly's opinion for the Special Court in *Conrail II*:

> What Congress desired to make clear was that its freeing of Amtrak Commuter from the obligations of the . . . Harlem-Hudson Agreement[ ], to which Conrail had been made subject by [the 3R Act], should not deprive Amtrak and Conrail of trackage rights needed for the operation of their respective passenger and freight services. The direction, "Compensation for such trackage rights shall be just and reasonable," should be read as applying only when

> compensation is due; if a person is legally entitled to use something free, requiring him to pay any compensation is not "just and reasonable."

598 F. Supp. at 1582. The Special Court then went on to conclude that section 504(f) "did not impose a statutory obligation on Conrail and Amtrak to pay for what the . . . Harlem-Hudson Agreement[ ] entitled them to retain free." *Id.* at 1582-83.

Nevertheless, petitioners say that Amtrak by its own admission has no contractual rights to use the Harlem-Hudson Line or GCT, for if it had it would not have instituted this proceeding; therefore, MTA argues, section 504(f) applies to Amtrak's use of those facilities. But we agree with the Commission and with Amtrak that section 504 only comes into play if the commuter authority such as MTA contracts with Amtrak Commuter to replace the previous service rendered to it by Conrail. *See* 45 U.S.C. § 584(a), (g) (authorizing either Amtrak Commuter or alternative commuter services). Since MTA did not enter into a contract with Amtrak Commuter, section 504 simply does not apply.

II. *Constitutionality of Section 402(a)*

Petitioners claim that section 402(a), if it applies to them, is an unconstitutional condemnation act because an administrative agency rather than a court determines the compensation and because the statute ties the agency's hands in determination of that amount. None of the arguments advanced in support of this contention is meritorious.

Petitioners cite *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893), for the proposition that

in eminent domain law determining what compensation is just is a judicial, not a legislative, function. We need not pause long with this argument. In *Conrail I*, Judge Friendly put it in a nutshell in denying MTA's motion to enjoin the ICC from proceeding in the instant action when he said that this argument of petitioners "does not appear to us to be substantial in light of *Thompson v. Texas Mexican Railway Co.*, 328 U.S. 134, 147-148 (1946)." *Conrail I* at 4. In *Thompson*, one carrier sought to terminate the contractually created trackage rights of another carrier that was undergoing reorganization under section 77 of the Bankruptcy Act. The question before the Court was whether the ICC had exclusive jurisdiction to set rates and to determine whether the trackage agreement should be terminated. Answering both questions in the affirmative, the Court found that Congress in section 7 of the Transportation Act of 1940, *see* 49 U.S.C. § 5(2)(a)(ii), had given the Commission exclusive jurisdiction to determine the terms and conditions by which trackage rights were acquired and that this delegation was appropriate. *See Thompson*, 328 U.S. at 146-51. The Court stated,

> [I]t is one of the Commission's high functions to protect the public interest against unfair or oppressive financial practices which in the past led to such great havoc and disaster. That policy would be undermined if the carriers could repair to courts for determination of the conditions under which trackage rights could be secured.

Id. at 148. While, to be sure, *Thompson* was not dealing with the Commission's power relative to trackage rights

under section 402(a), the logic of that opinion is obviously applicable here. *Thompson* unquestionably stands for the proposition that the delegation of power to the ICC to set trackage rates, subject to ultimate judicial review, is constitutional.

Amtrak also claims that section 402(a) unconstitutionally limits awards to avoidable costs. (We note in passing the irony of a transit authority that obtains a sixty-plus year lease of railroad property at a nominal rate and that, as a result of that lease, receives substantial aid from the federal government claiming that a federal agency is taking its leased property improperly because the compensation the authority receives is limited to avoidable costs.) Petitioners' argument fails for two reasons. In the first place, we agree with Amtrak that proceeding by way of section 402(a) is not a taking. Since *Munn v. Illinois*, 94 U.S. 113 (1876), railroad companies have been held subject to regulation so that, for example, a Commission order directing one carrier to receive and transport the cars of a second carrier over its terminal is not a taking, *Pennsylvania Co. v. United States*, 236 U.S. 351, 369-72 (1915); requiring railroads to disgorge half of their income in excess of 6% of the value of their property is not a taking, *Dayton-Goose Creek Railway Co. v. United States*, 263 U.S. 456, 484 (1924); and imposing a ceiling on particular rates is not a taking so long as it does not cause the railroad to lose money on its overall business, *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 148 (1953). While concededly what is a taking is an ad hoc factual inquiry, *see Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 622 (1981), requiring one

public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement, in order to deliver service to the public—as in the case of wheeling power from one point to another over one power company's transmission lines for another power company's benefit, *see* Federal Power Act, 16 U.S.C. §§ 824j, 824k—fits more into the regulatory rather than the taking mode as those terms have traditionally been applied by American courts. Rather than to cite us to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), as the Commission has done in its brief, perhaps it should have referred us to *Miller v. Schoene*, 276 U.S. 272 (1928). Or if we look at the "investment backed expectations" language of some of the recent Supreme Court cases, *e.g.*, *Kaiser Aetna*, 444 U.S. at 175, it is hard to imagine that when MTA, a public authority, leased the Harlem-Hudson Line at a minimal investment it had any expectation that it could preclude its lessor or those holding rights reserved by the lessor from exercising the reserved trackage rights. In other words, MTA's reasonable investment expectations have hardly been so frustrated as to amount to a taking.

The second reason that Metro's argument here fails is that, assuming arguendo that there has been a taking, compensation is adequate since MTA, in obtaining avoidable costs, will receive what it would have had but for the taking. *Cf. Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665, 668 (7th Cir. 1982). In other words, the owner, here the lessee, of the railroad facilities will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation. *United States v. Reynolds*, 397 U.S.

14, 16 (1970); *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961). Perhaps the whole taking argument can be dismissed with the comment that MTA and Metro-North really wish to seek to have Amtrak share with them the overhead costs of "ownership." If the Fifth Amendment required such a sharing, they would be put in a better position by Amtrak's appearance on the scene. True, Amtrak benefits. But if we know one immutable principle in the law of just compensation it is that value to the taker is not to be considered; only loss to the owner is to be valued. *United States v. Miller*, 317 U.S. 369, 375 (1943).

None of the cases cited by petitioners is on point. In *Southeastern Pennsylvania Transportation Authority v. ICC*, 644 F.2d 238 (3d Cir. 1981), while the court ruled that in certain circumstances (not at issue in this case) there should be an "equitable sharing" of the costs of ownership, that holding was based on the court's view of the legislative intent behind the 3R Act and the FSP, not on its view of constitutional dictates. *See id.* at 249-52. *In re Penn Central Transportation Co.*, 440 F. Supp. 1069 (E.D. Pa. 1977), holds that a private corporation may not be required to provide a public service without recovering a reasonable rate of return, *see id.* at 1074, something that is not involved in this case since the ICC is not requiring MTA to operate its commuter services at a loss. In *In re Valuation Proceedings*, 531 F. Supp. 1191 (Regional Rail Reorg. Ct. 1981), the court was merely trying to determine the level of compensation that the parties would have arrived at by arm's-length negotiation. *See id.* at 1342. The model of negotiation between a willing buyer and a willing seller is inappropriate to the instant case: Amtrak is the only passenger railroad that has or seeks to

have access to Metro-North's lines, and it is required by statute to provide service over the Harlem-Hudson Line. The two ICC trackage rights cases, *Missouri-Kansas-Texas Railroad Co. v. Kansas City Terminal Railway Co.*, 198 I.C.C. 4, 11 (1933), and *Chicago, Milwaukee, Saint Paul & Pacific Railroad Co. Trackage Rights*, 342 I.C.C. 578, 589, *aff'd sub nom. Louisville & Nashville Railroad Co. v. United States*, 369 F. Supp. 621 (W.D. Ky.), *aff'd by order*, 414 U.S. 1105 (1973), do *not* hold, as petitioners contend, that the Fifth Amendment requires a "usage-based sharing of fully allocated costs." Rather, in each case the Commission was concerned with the level of compensation that would allow common carriers to compete effectively. These decisions stand for the proposition that to foster competition the Commission can order a carrier to give another carrier trackage or terminal rights. Neither opinion interprets the RPSA, under which Congress has determined that, at least as to cases under section 402(a), proper compensation consists only of the payment of avoidable costs. Neither involves the question of how much compensation is constitutionally required. Thus, there is no support for Metro's claim that section 402(a)'s adoption of the avoidable cost methodology is constitutionally infirm.

III. *The Tenth Amendment*

MTA advanced a claim before the ICC, based on *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the requirement that MTA permit the operation of Amtrak trains over its lines violates the Tenth Amendment because it conscripts the services of a state agency to aid a federal public purpose. Since *National League of Cities* was recently overturned in *Garcia v. San Antonio*

Metropolitan Transit Authority, 105 S. Ct. 1005 (1985), petitioners can now only argue that section 402(a) is "destructive of state sovereignty," *id.* at 1020, and thus violates the Tenth Amendment under *Garcia*. However, *Garcia* held that claims of state sovereignty do not bar congressional action under the Commerce Clause, but rather are "more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 1018. In *Garcia*, the Court held that the imposition of minimum wage requirements on a local transit authority was not destructive of state sovereignty, especially in light of the massive subsidy provided by the federal government to that authority. Petitioners' Tenth Amendment argument is unavailing.

IV. *Petitioners' Other Objections*

Petitioners make three other objections: that the Commission (1) improperly found that they could not have achieved major track discontinuances in the absence of Amtrak; (2) also improperly found that MTA could not charge Amtrak for the use of space at GCT because MTA had no proprietary interest in the space; and (3) erred by declining to apply its order retroactively to a date prior to the stipulation between MTA and Amtrak. We find none of these rulings arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. *See Staten Island Rapid Transit Operating Authority v. ICC*, 718 F.2d 533, 539 (2d Cir. 1983); *Long Island Rail Road Co. v. United States*, 568 F.2d 254, 257 (2d Cir. 1977).

The Commission correctly found that petitioners had not shown that they could abandon any tracks (specifi-

cally two of the four tracks between Spuyten Duyvil and Croton-Harmon) were Amtrak not using the lines. Petitioners have neither the consent of Conrail, the trackage rights user, nor of Penn Central, the lessor. Nor is it by any means clear that such consent would be given. Conrail, in particular, appears to have a strong interest in preserving the status quo. As of 1983 it accounted for over one-third of the use of this segment of lines, whether measured in gross ton miles or car miles. Moreover, Metro-North operates 102 trains a day over this segment of line compared to Amtrak's eighteen, so that, absent some additional evidence, the claim that by eliminating less than one-sixth of the trains Metro could eliminate one-half of the physical plant seems unrealistic. In any event, the Commission did "direct Amtrak to contribute toward track maintenance in an amount determined under the SGTF [sic] formula"; petitioners do not complain about that formula, which is based on "Speed Factored Gross Ton Miles."

Similarly, the space used by Amtrak at GCT is not within MTA's leasehold. Amtrak had the right to free use of space at GCT under the original 1971 Penn Central-Amtrak Agreement. Petitioners argue that the Settlement Agreement entered into between Penn Central and Amtrak on February 15, 1978, "cancelled" the 1971 Agreement. However, under the Settlement Agreement the parties simply agreed not to assert against each other any claims based, inter alia, on the 1971 Agreement. The 1978 Agreement specifically states in paragraph 3 that "Amtrak and Penn Central agree that any rights of either against third parties . . . acquired under [the 1971 Agreement] shall remain in full force and effect." Thus, the 1971 Agreement was not "cancelled" as to Amtrak's

rights *vis a vis* MTA, and the Commission correctly concluded that Amtrak could continue to have free use of the GCT space.

As to retroactivity, the Commission has no jurisdiction to fix compensation in this respect absent the consent of the parties. *See National Rail Passenger Corp. and Union Pacific Railroad Co.*, 348 I.C.C. 926, 935-37 (1977). In a letter dated December 31, 1982, the parties agreed that compensation should be determined as of January 1, 1983. This date seems particularly appropriate since before January 1, 1983, Conrail, not MTA, provided the facilities and services required for Amtrak operations and Amtrak has paid Conrail in full for having done so.

Petition denied.

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 30426

NATIONAL RAIL PASSENGER CORPORATION APPLICATION UNDER SECTION 402(a) OF THE RAIL PASSENGER SERVICE ACT

Decided: July 27, 1984

On February 27, 1984, the National Rail Passenger Corporation (Amtrak or applicant) filed an application for an order pursuant to section 402(a) of the Rail Passenger Service Act (RPSA) [45 U.S.C. 562(a)], requesting that the Commission fix just and reasonable compensation to be paid by Amtrak for the provision of services by, and the use of tracks and facilities of, Metro-North Commuter Railroad Company and the New York Metropolitan Transit Authority (jointly referred to as Metro). Amtrak also sought an interim decision establishing standards for incentive performance payments. The application involves a rail line (the Hudson line) and facilities at and between Grand Central Terminal and Poughkeepsie, NY, a distance of 74 miles.

By decision served March 28, 1984, the application was set for modified procedure with all statements in support and opposition required to be filed by April 17, 1984, and all rebuttal statements to be filed by May 7, 1984. By letter and accompanying documents dated April 6, 1984, Metro submitted an extensive response to the application questioning the Commission's jurisdiction to grant the relief sought. While this material was received on April 9, 1984, it was not formally submitted for filing in the docket until April 25, 1984. Amtrak submitted verified statements in support of the application as well as a reply to Metro's motion to dismiss.

Finance Docket No. 30426

PRELIMINARY MATTERS

Amtrak argues that Metro's motion to dismiss and accompanying material should be rejected pursuant to 49 C.F.R. 1104.13, because it was not filed within 20 days after the filing of the application. We disagree. Metro had no formal notice of the acceptance of the application until March 28, 1984. Thus, the only deadline with which Metro was required to comply was April 17, 1984. Although technically Metro made no formal submission prior to that date, it did informally submit the material on April 9. Also, Metro states that it was not served with a copy of our March 28th decision. It is well settled that the Commission is entitled to a measure of discretion in administering its own rules as it deems necessary to resolve correctly the issues which come before it. *American Farm Lines* v. *Black Ball,* 397 U.S. 532, 538 (1970). Accordingly, Metro's late-filed motion to dismiss and supporting argument will be accepted for filing.

Section 402(a) of the RPSA provides that the Commission's decision in this proceeding shall be entered within 90 days after application by Amtrak. Because of the confusion in assembling the record, Metro's failure to submit any substantive response to Amtrak's requested relief, and the complexity of the jurisdictional issue raised by Metro, we will not be able to complete our consideration of the application within this time period. Although Section 402(a) makes no specific provision for extension of this deadline, the Commission has in the past extended the time within which to arrive at a decision under Section 402(a) in cases such as this involving multiple and complex issues. *See, for example, Amtrak and Wash. Term. Co., Tracks and Facilities,* 348 I.C.C. 86, 87 (1975). In light of the circumstances described above and in conformance with administrative due process, the statutory deadline in this proceeding will be extended to September 25, 1984.

Finally, in our March 28th decision, we denied Amtrak's request for an interim decision regarding an incentive performance arrangement. We still do not conclude that an interim decision is necessary. Consideration of the application will be expedited, and an interim decision could precede the final decision by only a short time, if at all.

BACKGROUND

The application is related to a proceeding now before the Special Court created by the Regional Rail Reorganization Act of 1973 (3R Act) to review disputes arising from the implementation of that Act. The dispute in the Special Court concerns trackage rights involving freight operations by Conrail and intercity passenger operations by Amtrak over two sets of lines from Grand Central Station—the West End line, from New Rochelle Junction, NY, to New Haven, CN, and the Harlem-Hudson line. These lines are presently owned and leased, respectively, by the Connecticut Department of Transportation (CDOT) and Metro.

By agreements executed in 1970 and 1972, the Penn Central Transportation Company (Penn Central) trustees sold or leased the track in question to the State transportation authorities, reserving to Penn Central trackage rights so as to continue freight and intercity passenger operations. The parties agreed that until the year 2031, Penn Central's operations under these retained trackage rights would be without charge unless they exceeded certain stated levels. The State authorities also contracted with the Penn Central to provide subsidized commuter service.

Under the 3R Act and the *Final System Plan,* Penn Central's freight trackage rights under these contracts were conveyed to the Consolidated Rail Corporation (Conrail) and its intercity passenger trackage rights for lines within the Northeast corridor were conveyed to Amtrak. Thus, Conrail could conduct freight

operations on both the West End and the Harlem-Hudson lines and Amtrak could conduct passenger service on the West End line pursuant to the terms of the Penn Central agreements. Because the Hudson portion of the Harlem-Hudson line was not in the Northeast corridor, Amtrak did not receive Penn Central's right to conduct passenger operations on this line. Amtrak trains have been operated on the Hudson line pursuant to agreements with Conrail commencing in 1976. Finally, Conrail assumed the commuter operations on both lines pursuant to statute in 1976.

Congress relieved Conrail of its obligations to conduct these commuter operations as of January 1, 1983, in section 1136 of the Northeast Rail Service Act of 1981 (NRSA). This statute also added Title V to RPSA, providing that State authorities that did not want to provide commuter services in Conrail's place could contract with Amtrak Commuter for these services.[1] Both Metro and CDOT elected not to contract with Amtrak Commuter, but to provide commuter service themselves.

Conrail has requested that the Special Court issue an order declaring that the terms of the Penn Central agreements control compensation for Conrail's use of both lines for freight service. Amtrak has similarly requested a declaration of its rights to use the West End line pursuant to the terms of the Penn Central agreements. Because the Penn Central agreement does not apply to Amtrak's use of the Hudson line, Amtrak has asked the Commission to determine the compensation owed under Section 402(a) of RPSA for trackage rights and use of facilities and services associated with this line.

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[1]Amtrak Commuter is an entity established by NRSA for the specific purpose of providing commuter services.

Finance Docket No. 30426

METRO'S JURISDICTIONAL ARGUMENT

Metro maintains that when NRSA terminated Conrail's obligation to provide commuter service under the Penn Central contracts, the trackage rights reserved in the 1970 and 1972 agreements were also extinguished. Metro contends that the only trackage rights retained by Conrail or Amtrak are those reserved in section 504(f) of Title V (RPSA). It argues that also under that section, the Special Court has jurisdiction to determine the compensation to be paid by Amtrak for its use of the Hudson line. Metro further maintains that because section 504(f) was enacted as part of NRSA, it brings into effect section 1152 of NRSA, which provides that the Special Court has exclusive jurisdiction to interpret the provisions of that act.

DISCUSSION AND CONCLUSIONS

We agree with Amtrak's position that the clear statutory basis for the Commission's jurisdiction over this application is section 402(a) of the Rail Passenger Service Act. Amtrak's right to provide intercity passenger service over the lines of any railroad or regional transportation authority derives directly from section 402(a). Congress further created a mechanism to enforce that right and vested jurisdiction to resolve disputes in the Commission. Section 402(a) is clear and explicit in its application and provides that if Amtrak and another railroad, or a regional transportation agency, cannot agree on the use of a rail line or the provision of services to Amtrak,

> the Interstate Commerce Commission shall, within ninety days after application by [Amtrak] . . ., if it finds that doing so is necessary to carry out the purposes of this Act, order the provision of services or the use of tracks or facilities of the railroad by [Amtrak] . . . on such terms and for such compensation as the Commission may fix as just and reasonable, . . .

There are two conditions to the application of this statute. First, there must be a "failure to agree" between Amtrak and a railroad or regional transportation agency. Metro admits in its letter of April 6, 1984, and in its counterclaims before the Special Court that there is no agreement between it and Amtrak regarding the use of the Hudson Line. Thus, the first condition is satisfied.

Second, the Commission's order must be "necessary to carry out the purposes of" the Act. Amtrak explains that the Hudson line is an essential link in its routes from Grand Central Station in New York to Chicago, Montreal and Toronto, and Amtrak's operations on the line are integral parts of the national rail passenger network that the Act is designed to preserve. Metro's letter does not question the proposition that an order fixing the terms for Amtrak's use of this important line is "necessary to carry out the purposes of" the Act. Thus, the applicability of Section 402(a) to this proceeding is clear and unequivocal.

Metro argues that section 504(f) of RPSA and section 1152 of NRSA somehow preempt section 402(a) and vest jurisdiction over this dispute in the Special Court. However, neither section 504(f) nor any other provision of Title V contain any terms that expressly or implicitly alter the application of section 402(a) to the facts presented here. All of Title V deals with the establishment and operation of Amtrak Commuter, a legal entity which would become operational in a given situation only if chosen by a commuter authority to take over Conrail's responsibilities. Section 504(f) provides:

> Amtrak Commuter shall not be subject to any lease or agreement with a commuter authority under which financial support was being provided on January 2, 1974, for the continuation of rail passenger service, except that the Corporation and Conrail shall retain appropriate trackage rights (for passenger and freight operations respectively) over any rail

> properties owned or leased by such commuter agency. Compensation for such trackage rights shall be just and reasonable.

Metro maintains that this section sets forth all trackage rights available to Amtrak and thereby preempts Amtrak's option to obtain trackage rights under section 402(a) of RPSA. However, the language on which Metro relies is an exception to a provision governing the operation of Amtrak Commuter. This section clearly was to become operative only if Amtrak Commuter was chosen to operate a commuter service. Thus, instead of showing a congressional intent to bypass section 402(a), section 504(f) has no effect on that provision at all.

Metro's reliance on section 1152(a)(1) of NRSA is also misplaced. This provision vests exclusive jurisdiction in the Special Court over "any civil action"

> relating to the enforcement, operation, execution, or interpretation of any provision of [NRSA] . . . or administrative action taken thereunder to the extent such action is subject to judicial review; . . .

By its references both to "any civil action" and to review of "administrative action" taken under NRSA, section 1152(a)(1) does no more than distribute jurisdiction among the federal courts. It does not address the problem raised by Metro, which involves allocation of jurisdiction between the federal courts on the one hand and federal administrative agencies on the other. Amtrak's application for an administrative order under section 402(a) is not a "civil action" within the meaning of this section, and the Special Court therefore does not have original jurisdiction over it. Nor is it a request for administrative action under the provisions of NRSA subject to review in the Special Court. Section 402(a) orders have routinely been reviewed in the United States Courts

of Appeals under the provisions of the Hobbs Act. *See, for example National R.R. Passenger Corp.* v. *I.C.C.*, 610 F.2d 881 (D.C. Cir. 1979). Thus, we conclude that Metro's motion to dismiss or hold the proceeding in abeyance pending the Special Court's decision should be denied.

REVISION OF PROCEDURAL SCHEDULE

In exclusively pressing its jurisdictional arguments, Metro has submitted no testimony on the substance of Amtrak's compensation proposal. While expedition of this proceeding is of paramount importance, we are reluctant to proceed without some explanation by Metro of its position on these proposals. Thus, we will allow Metro another 15 days to submit a substantive response to Amtrak's request for relief. We will also honor Amtrak's request for a 10-day rebuttal period.

It is ordered:

(1) The late-tendered letter/motion and accompanying documents submitted by Metro-North Commuter Railroad are accepted for filing.

(2) The motions of Metro to dismiss or hold the application in abeyance are denied.

(3) The statutory deadline in this proceeding is extended until September 25, 1984.

(4) By August 20, 1984, Metro must file verified statements in opposition to the applications. Replies must be filed by August 28, 1984.

(5) This decision is effective on the date of service.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison.

James H. Bayne
Secretary

(SEAL)

Finance Docket No. 30426

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30426

NATIONAL RAIL PASSENGER CORPORATION
APPLICATION UNDER SECTION 402(a)
OF THE RAIL PASSENGER SERVICE ACT

Decided October 25, 1984

On February 27, 1984, the National Rail Passenger Corporation (Amtrak) filed an application for an order pursuant to Section 402(a) of the Rail Passenger Service Act (RPSA) 45 U.S.C. 562(a), requesting that the Commission fix just and reasonable compensation to be paid by Amtrak for the provision of services by and the use of tracks and facilities of Metro-North Commuter Railroad Company (Metro) and the New York Metropolitan Transportation Authority (MTA) (jointly referred to as Metro). Amtrak also sought an interim decision establishing standards for incentive performance payments. The application involves a rail line (The Hudson Line) and facilities at and between Grand Central Terminal and Poughkeepsie, NY, a distance of 74 miles.

By decision served March 28, 1984, this proceeding was designated for processing under the modified procedure, and dates were set for filing verified statements in support and opposition. Amtrak's request for an interim decision establishing standards for incentive performance payments to Metro was held in abeyance.

On April 6, 1984, Metro submitted a response to the application questioning our jurisdiction to grant the relief sought. Amtrak submitted verified statements in support of the application and a reply to Metro's motions to dismiss or stay the proceeding. By decision served August 3, 1984, we accepted for filing Metro's motions to dismiss or hold the application in abeyance; extended the statutory deadline to September 25, 1984; and set dates for verified statements by Metro and replies by Amtrak. We concluded that an interim decision was not necessary.

Subsequently, Metro requested a 2-month extension to file its evidence. By decision served August 24, 1984, the statutory deadline was extended to October 25, 1984, and additional time was provided for Metro to file its verified statements and for Amtrak to reply. On August 20, 1984, Metro filed an answer to Amtrak's application, and on September 19, 1984, Metro timely filed objections to our exercise of jurisdiction in this matter and to Amtrak's proposals regarding the payment of compensation. Amtrak replied. Metro submitted a reply to Amtrak's reply. Because replies to replies are not permitted under 49 CFR 1112.2, Metro's pleading will not be considered.

Preliminary Matter

In its objections, Metro includes a request to cross-examine those individuals submitting verified statements on behalf of Amtrak. However, our rules provide that cross-examination will not be held unless material facts are in dispute. 49 C.F.R. 1112.10. No showing has been made that any material factual issues are in dispute in this proceeding. Rather, the dispute concerns the cost standards to be applied in determining just compensation. Resolution of that issue does not require cross-examination of Amtrak's witnesses. Accordingly, the request for cross-examination is denied.

Background

This application is related to a proceeding now before the Special Court created by the Regional Rail Reorganization Act of 1973 (3R Act) to review disputes arising from implementation of that law. The issues involved in the Special Court proceeding previously have been described in the decision served August 3 1984. Briefly, the dispute in the Special Court concerns trackage rights involving freight operations by the Consolidated Rail Corporation (Conrail) and intercity passenger operations by Amtrak over two sets of lines from Grand Central Station—the West End line, from New Rochelle Junction, NY, to New Haven, CT, and the Hudson line to Poughkeepsie. Conrail has requested that the Special Court issue an order declaring that the terms of agreements entered into between the Penn Central Transportation Company (Penn Central) and State transportation authorities control compensation for Conrail's use of both lines for freight service. Amtrak similarly has requested a declaration by the Special Court of its rights to use the West End line pursuant to the Penn Central agreements. However, because the Penn Central agreements do not apply to Amtrak's use of the Hudson line, Amtrak has filed this application requesting the Commission to determine the compensation owed under Section 402(a) of the RPSA for trackage rights and use of facilities and services associated with the Hudson line.

METRO'S CONTENTIONS

In its answer and objections, Metro renews its argument that Section 402(a) has no application and that we have no jurisdiction in this proceeding. Metro also argues that, if Section 402(a) is deemed applicable, to the extent it applies here it violates the Fifth and Tenth Amendments to the Constitution. Alternatively, Metro requests that this proceeding be converted to one under 49 U.S.C. 11103(a). Finally, Metro argues that it should be awarded compensation retroactive to April 1, 1976.

Jurisdiction. Metro contends that section 402(a) does not apply to it, because it is neither a railroad nor a regional transportation agency as defined by RPSA, but rather is a "commuter authority" under Section 103(8) of the RPSA. 45 U.S.C. 503(8). It argues that Section 402(a) applies only to rail carriers that discontinued intercity rail passenger service under Section 401 of the RPSA, 45 U.S.C. 561(a)(1), and not to State agencies that conduct commuter rail service.[1]

However, there is no support in the statute, its legislative history, or the Commission's interpretation for Metro's narrow interpretation of the scope of Section 401(a).[2]

Section 103(15) of RPSA, 45 U.S.C. 502(15), defines a regional transportation agency as an "authority, corporation or other entity established for the purpose of providing passenger service within a region." Metro admits in its objections that it is a public agency. Thus, Metro comes within the broad definition of "authority, corporation or other entity" found in section 103(15). Moreover, Metro's commuter operations qualify as passenger service within the meaning of Section 103(15). Congress has recognized commuter service as one type of passenger service under the RPSA since it first enacted section 402(a) and section 103(15) in 1970. In a more recent amendment of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Congress confirmed this interpretation by referring to regional transportation agencies as possible providers of commuter service. Pub. L. No.

[1]In section 401, Congress permitted providers of intercity passenger service a one-time opportunity to discontinue operations without applying to the Commission, provided that they make a payment to Amtrak pursuant to the terms of the statute for assuming their passenger operations

[2]The legislative history of Section 402(a) and the various amendments indicate that Congress intended Amtrak to have access to all facilities necessary for providing intercity rail passenger service.

94-210, 705, 90 Stat. 31, 123 (1976). Contrary to Metro's assertion, then, it is a regional transportation agency within the meaning of 45 U.S.C. 502(15).

Metro essentially contends that the terms "regional transportation agency" and "commuter authority" found in the RPSA are mutually exclusive, and that because section 402(a) does not mention "commuter authorities," they are not included within the purview of that section. A more reasonable interpretation, however, is that the terms "regional transportation agency" and "commuter authority" overlap to the extent that the former can include the latter and thus can apply to the same entity.[3] The definition of a regional transportation agency is broad enough to include a commuter authority. Thus, even though Metro is a commuter authority under section 103(8), it still comes within the definition of a regional transportation authority.

Metro's contention that section 402(a) applies only to intercity rail passenger carriers that took advantage of the discontinuance provision of section 401 also lacks merit. The Commission has long held that sections 401 and 402 operate independently of one another. In *Penn Central-Compensation for Passenger Service,* 342 I.C.C. 765, 767-768 (1973), Amtrak urged the Commission to consider the economic benefit that the rail carrier enjoyed when Amtrak relieved it of its obligation to provide intercity rail passenger service under section 401 in every section 402(a) application to set trackage right fees. The Commission rejected Amtrak's argument, however, finding that the rail carrier's payment to Amtrak required under section 401 provided the entire consideration for being relieved of its common carrier obligation. Contrary to Metro's contentions, sections 401 and 402(a)

[3]In this connection we note that section 103(8) of the RPSA defines "commuter authority" as any State, local, or *regional authority* established for purposes of providing commuter service.

are not interdependent. Moreover, the Commission has applied section 402(a) to *all* railroads and did not limit its coverage to railroads that discontinued service pursuant to section 401.

Metro also asserts that the transfer of rights in rail trackage to Amtrak pursuant to the Regional Rail Reorganization Act of 1973 (3R Act), the Final System Plan, and the 4R Act demonstrate that section 402(a) applies only to intercity rail passenger carriers that terminated service pursuant to section 401. Metro argues that if Amtrak could assert rights under section 402(a) over the property of *all* rail carriers (not just carriers that used Section 401), there was no need for the transfers to Amtrak authorized by Congress in the 3R Act, the Final System Plan, and the 4R Act. This analysis, however, ignores the disarray of rail transportation in the Northeast Corridor (i.e., bankruptcies and reorganizations) requiring a total restructuring of the rail operations in the 3R Act, in the Final System Plan, and in the 4R Act rather than the piecemeal approach available in Section 402(a). In reorganizing the Northeast railroads, Congress did not repeal section 402(a) but, rather, retained this provision to facilitate Amtrak's operation.

Moreover, in a number of amendments, Congress has expanded statutory mechanisms that Amtrak can use to improve its operational efficiency. For example, the Amtrak Improvement Act of 1973 conferred the power of eminent domain upon Amtrak if a rail carrier's property is needed to provide efficient and economical rail passenger service and the conveyance will not significantly impair operation of the railroad. 45 U.S.C. 562(d)(1). This Act also provided that Amtrak may apply to the Secretary of Transportation to require a railroad to permit accelerated speeds for Amtrak trains if the railroad refused to do so initially upon Amtrak's request. 45 U.S.C. 562(f). Structurally, then, Congress has increased Amtrak's power, rather than having decreased it as

Metro's section 402(a) arguments suggest. Thus, neither the language of section 402(a) nor the statutory scheme underlying Amtrak's operations support Metro's interpretation of section 402(a).

Constitutional arguments. Metro asserts that section 402(a) violates the Fifth Amendment of the Constitution, because Congress has determined the measure of just compensation and has delegated the duty of applying this standard to the Commission. It is not clear that section 402(a) represents a taking under the Fifth Amendment, since Metro still has a right (albeit nonexclusive) to use its property. Nevertheless, Metro's claim that section 402(a) violates the Fifth Amendment is without merit. Moreover, Metro's claims of unconstitutionality are premature. After our determination of just and reasonable compensation, the aggrieved party may file a petition for review under the Hobbs Act. 28 U.S.C. 2321(a) and 2342(5).

Metro asserts that only a court can establish constitutionally required compensation. However, as early as 1896, the Supreme Court stated in *Baumann* v. *Ross,* 167 U.S. 548, 593 (1896):

> By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury. [citations omitted]

The Courts have continued to find no constitutional bar to the delegation of the power to determine claims against the United States to an executive officer or an administrative board. *See, generally, Ex Parte Bakelite Corp'n.,* 279 U.S. 438, 453 (1929); (Seventh Amendment); *Williams* v. *United States,* 289 U.S. 553, 580-81 (1933); (Art. III); and *Chicago and North Western*

Transp. Co. v. *United States*, 678 F.2d 665 (7th Cir. 1982)(Fifth Amendment). Thus, Congress has properly, by statute, delegated to the Commission the function of setting compensation for Amtrak's use of rail lines.

Metro also claims that section 402(a) interferes with its exercise of State sovereignty rights in violation of the Tenth Amendment.[4] Metro's reliance on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), however, is misplaced. In that case, the Supreme Court held that Congress may not enact legislation that interferes with activities typical of those performed by State and local government, *i.e.*, police powers. *Id.*, at 843, 851. Accordingly, the Court struck down legislation that applied the minimum wage provision of the Fair Labor Standards Act to State employees, because the law would have effectively required a total restructuring of State services. The present case, by contrast, involves a matter traditionally entrusted to the Federal government under the Commerce Clause—the use of a segment of rail line to connect an interstate passenger route. *Cf., Transportation Union* v. *Long Island R. Co.*, 455 U.S. 678 (1982). As a result, Metro's claim of State sovereignty must give way to the interstate commerce needs of a functioning network of interstate rail passenger routes.

Conversion to a proceeding under 49 U.S.C. 11103(a).—Metro's request that we convert this case into a proceeding under 49 U.S.C. 11103(a) must be rejected. Amtrak is excluded from 49 U.S.C. 11103(a)[5] by section 306(a)(2) of the RPSA. *National R. Pass. Corp. and TRRA, Just Compensation*, 348 I.C.C. 901, 916-917 (1977). Only Section 402(a) applies to this dispute.

[4]As discussed *supra*, Metro's claims in this regard are premature. Moreover, contrary to Metro's assertions, this case does not involve any "conscription" of State personnel, but merely compensation for trackage rights.

[5]Formerly Section 3(5) of the Interstate Commerce Act.

Retroactive compensation.—Metro's request that the Commission prescribe compensation on a retroactive basis to April 1, 1976, also must be rejected. In the absence of consent by the parties, this Commission is without jurisdiction to fix compensation retroactively. *National R. Pass. Corp. and UP Tracks & Facilities,* 348 I.C.C. 926, 935-37 (1977). The present controversy between Amtrak and Metro dates back to January 1, 1983, when Conrail withdrew from passenger transportation. The parties have stipulated that the costing principles established by the Commission in this case will be applied retroactively to that date.

JUST AND REASONABLE COMPENSATION

Amtrak's Position.—Amtrak maintains that, under Section 402(a), Metro is entitled to receive only the incremental costs of providing the involved service, and that any payments in excess of incremental costs must be related to the quality of service provided by Metro.

Metro provides station personnel, yard switching, accounting and administration, third rail electric power, and other incidental services. Metro does not provide Amtrak with train and engine crews for service on the Hudson line. Rather, those crews are provided by Conrail. There is no permanent contractual relationship between Amtrak and Metro concerning operating rights, payment of costs, or quality of service in connection with the operation of Amtrak trains over the Hudson line. However, Amtrak and Metro do have interim letter agreements that permit continued operation of the Amtrak service on the Hudson line and have established a temporary liability arrangement, but those agreements do not resolve the underlying disputes between the parties concerning compensation.

Amtrak claims that the only activities currently performed by Metro that generate significant avoidable costs involve electric power consumption, switching, additional clerks, and mainte-

nance of rail lines. Amtrak notes that, in addition to the large commuter operation on the Hudson line, Conrail makes substantial use of that line to transport freight. While conceding that its operations over the Hudson line result in some additional costs for Metro, Amtrak argues that its services are limited as compared with other operations on the line, and that its operations do not cause any change in the size or configuration of the physical plant of the Hudson line.

The activities (and the annual cost for each) for which Amtrak would propose to pay Metro are as follows:

1. Third Rail Electricity	$ 33,015
2. Metered Electricity	161,195
3. Switching	288,602
4. Operations Office Clerks	69,258
5. Trash Removal	54,320
6. Ticket Clerks	90,210
7. Track Maintenance of Way	181,872
Total	878,472

Amtrak's proposal would provide Metro with the opportunity to earn incentives for performance above 80 percent on time, to a maximum potential of $2.50 per train mile for each Amtrak train if all trains were operated on time. Penalties would be assessed for performance below 70 percent on time, but with a limitation that penalties could not exceed the amount of incentives earned in the preceding 12 months, so that Metro would not be exposed to the risk of receiving less than its avoidable costs with respect to operation of Amtrak service over the Hudson Line. Amtrak submits that this proposed arrangement is consistent with arrangements negotiated by Amtrak and freight railroads over whose lines Amtrak trains are operated.

There is currently in effect an interim arrangement between Amtrak and Metro that apportions the risk of liability from accidents arising on the Hudson Line without regard to fault.

Amtrak requests that a no-fault arrangement be adopted in connection with the permanent terms and conditions to be established in this proceeding.

Amtrak argues that, in the absence of its operations, all of the present tracks between Grand Central and Poughkeepsie would continue to be needed by Metro and Conrail for their current operations. With regard to the 22.2-mile section of the Hudson line between Spuyten Duyvil (milepost 11.2) and Croton-Harmon (milepost 33.4), there are presently four tracks. In addition to Amtrak's nine trains in each direction, Metro operates 51 express or local commuter trains a week each way as far as Glenwood (milepost 16.3) and 43 each way as far as Croton-Harmon. In addition, Conrail operates an average of three freight trains (averaging 45 cars) in each direction over this segment. Amtrak submits that under present conditions two tracks in each direction would continue to be necessary even if its operations were eliminated. Similarly, Amtrak argues, at Grand Central, elimination of Amtrak's share of current operations (18 of 479 scheduled passenger trains) would not materially affect the continued need by Metro for use of the two platform tracks used by Amtrak.

Metro's Position.—Metro argues that it is entitled to the benefits of fully-distributed costing of all expenses incurred in connection with the Grand Central and Hudson terminals, since these benefit Amtrak. As total compensation required of Amtrak for its fair usage based share of the Hudson line and the Grand Central Terminal facilities and services, Metro requests the following:

Solely Related and Directly Attributable Charges	$1,653,407
Common Base Costs	4,726,010
Capital Costs	2,016,000
TOTAL	8,395,417

DISCUSSION AND CONCLUSIONS

The proper costing standard to be used in section 402(a) proceedings is avoidable costs. *Costing Methodologies-NE. Corridor: Commuter Serv.*, 367 I.C.C. 192 (1983). Avoidable costs means those expenses that would not be present if a minority user (in this case Amtrak) were eliminated. Use of avoidable costs puts the dominant user (Metro) in a position no better or no worse than if the minority user had not been present. In *Costing Methodologies, supra,* we developed a set of procedures that fairly allocate costs of a railroad plant that is used by more than one operator. Those procedures assign the avoidable costs to a minority user, or users, and the residual costs to the dominant user. The procedures involve three basic steps. The first is the development of a Facility Utilization Plan and an Employee Utilization Plan. These plans list all facilities and personnel involved in the operation of a service. The second step is to use those plans to identify the solely related, directly attributable, and common right-of-way related costs. The third and final step is the assignment to the various users of the costs that are developed from the Utilization Plans.

The procedures also provide for a return on certain property and permit minority users to have access to facilities and records for audit and inspection. We conclude that these procedures should be used for determining the costs to be paid to Metro by Amtrak for use of the facilities in Grand Central Terminal and use of Metro's tracks between New York and Poughkeepsie. Application of these procedures will result in an equitable payment by Amtrak and place Metro in the same position as if Amtrak did not use Metro's facilities.[6]

[6] In *Costing Methodologies, supra,* 367 I.C.C. at 195, we stated that we are not prepared to incorporate a procedure that specifies quality of service payments into the current procedures. Rather, this complex issue is best left to negotiation between the affected parties.

We are not able to make a specific dollar determination as to the amount of compensation due Metro by Amtrak, because the parties have not submitted either a Facilities Utilization Plan or an Employee Utilization Plan as required by *Costing Methodologies, supra.* For example, without these plans we cannot determine whether certain facilities (such as tracks in Grand Central Terminal and one of four tracks between Croton-Harmon and Spuyten Duyvil) would be avoidable if Amtrak trains were to cease operation. In view of this evidentiary deficiency and to reach an equitable decision in this proceeding, the statutory deadline in this proceeding will be extended. The parties will be directed to develop a Facilities Utilization Plan and Employee Utilization Plan. The commission will resolve any dispute involving the content of the Utilization Plans if the parties are unable to agree.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. Metro's request for cross-examination is denied.

2. The statutory deadline in this proceeding is extended to January 15, 1985.

3. By November 26, 1984, Metro and Amtrak must develop and file a Facilities Utilization Plan and an Employee Utilization Plan, in accordance with the procedures set forth in *Costing Methodologies, NE. Corridor: Commuter Serv.*, 367 I.C.C. 192 (1983). Replies may be filed by December 11, 1984.

4. This decision is effective on the date of service.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett, Gradison, Simmons, Lamboley and Strenio.

James H. Bayne
Secretary

(SEAL)

Finance Docket No. 30426

INTERSTATE COMMERCE COMMISSION DECISION

Finance Docket No. 30426

NATIONAL RAIL PASSENGER CORPORATION APPLICATION UNDER SECTION 402(a) OF THE RAIL PASSENGER SERVICE ACT

Decided: July 5, 1985

On February 27, 1984, the National Rail Passenger Corporation (Amtrak) filed an application for an order pursuant to Section 402(a) of the Rail Passenger Service Act (RPSA), 45 U.S.C. 562(a), requesting that the Commission fix just and reasonable compensation to be paid by Amtrak for the provision of services by, and the use of the tracks and facilities of, Metro-North Commuter Railroad Company (Metro-North) and the New York Metropolitan Transportation Authority (MTA) (jointly referred to as Metro). The application involves a rail line (the Hudson Line) and facilities at and between Grand Central Terminal and Poughkeepsie, NY, a distance of 74 miles.[1]

By decision served October 29, 1984, the Commission concluded that it was unable to make a specific determination as to the amount of compensation due Metro by Amtrak because the parties had not submitted either a Facilities Utilization Plan (FUP) or an Employee Utilization Plan (EUP). Accordingly, the Commission directed Metro and Amtrak to develop and file those plans by November 26, 1984. Replies were to be filed by December 11, 1984. The Commission also extended the statutory

[1]The Railway Labor Executives' Association (RLEA) filed a letter-protest to this application, requesting the imposition of labor protective conditions. No further pleadings were submitted by RLEA. Since this proceeding does not involve issues of labor protection, RLEA's opposition will not be considered further.

deadline to January 15, 1985. Subsequently, by decisions served December 12, 1984, and February 28, 1985, the parties were accorded additional time to file their FUP's and EUP's and replies, and the statutory deadline was extended to June 17, 1985. Metro and Amtrak now have submitted their FUP's and EUP's and replies.

Commission jurisdiction over this matter is clearly based on section 402(a), which states that:

> The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree, ... In the event of a failure to agree, the Interstate Commerce Commission shall, . . . order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable. . . .

Metro-North qualifies as a railroad as defined in section 103(14) of the RPSA and 49 U.S.C. 10102(19, 20, and 25). Nothing in section 1137 of the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, 95 Stat. 647 (NERSA) exempts Metro-North from Commission jurisdiction. In fact, the Commission has ruled, at Metro-North's request, that Metro-North was a railroad subject to Commission jurisdiction. The Commission then exempted Metro-North from 49 U.S.C. Subtitle IV. However, that action did not change Metro-North's status to that of a non-railroad, but merely a railroad not subject to Commission jurisdiction under Subtitle IV. *See* Finance Docket No. 30063, *Metro-North Commuter Railroad Company—Exemption from 49 U.S.C. Subtitle IV* (not printed), served December 2, 1982. Hence Metro-North falls within the meaning of a railroad under section 402(a).

Finance Docket No. 30426

PRELIMINARY MATTER

By letter-petition filed May 3, 1985, Metro requests an oral hearing confined to certain issues with which it is in disagreement with Amtrak. Metro notes that Amtrak's reply to Metro's FUP and EUP for the first time claims: (i) that the space occupied by Amtrak's ticket office at Grand Central Terminal (GCT) is not covered by the Harlem Hudson Lease Agreement, dated June 1, 1972, between Penn Central Corporation (Penn Central) and MTA; (ii) that even if that space is included within the leasehold, Amtrak has a right to free use of that space by virtue of the provisions of its April 16, 1971, Basic Agreement with Penn Central; (iii) that Consolidated Rail Corporation (Conrail) similarly has a right of free use of that space by virtue of the trackage rights retained by its predecessor, Penn Central, under that lease and that Amtrak is entitled to the benefits of Conrail's right under its "off-corridor" operating agreement with Conrail; and (iv) that Metro's analysis of avoidable tracks is deficient because the consents of Penn Central and Conrail are required before track and signal alterations could be made, and there is no showing that those consents can be procured. Metro denies each of these claims and requests an opportunity to respond to them. Metro also contends that the Commission, in its decision of October 29, 1984, erred in rejecting a reply by Metro to a reply statement filed by Amtrak. The rejected pleading dealt with the retroactivity of the compensation to be paid to Metro by Amtrak.

Amtrak replied to the motion for oral hearing by letter dated May 1, 1985. Amtrak contends that the issues raised by Metro do not warrant an oral hearing, and that the documents referred to by Metro are clear on their face. Amtrak explains that there was no reason for it previously to make the contentions contained in its reply to Metro's FUP and EUP and that those contentions are responsive to arguments advanced by Metro in its submission. Addi-

tionally, Amtrak submits that the issues in the present case arose as a result of the transfer of the management of GCT and the Hudson Line from Conrail to Metro effective January 1, 1983, and that Amtrak and Metro have agreed that the award of compensation will be applied retroactively only to January 1, 1983.

Metro's motion for oral hearing will be denied. The evidence presented by Amtrak is responsive to Metro's claims of a proprietary interest in the line and the ticketing facilities, and is, therefore, proper rebuttal. Metro has not shown what evidence it would produce to rebut Amtrak's evidence should it be given an opportunity to do so. With regard to the rejection, in the decision of October 29, 1984, of Metro's reply to Amtrak's reply, this action was in accordance with 49 C.F.R. 1112.2. No showing was made by Metro that the evidence it sought to present could not have been presented in its prior verified statements. Furthermore, Metro did not timely file an appeal to the rejection of its reply. There is no reason to hear further argument on the issue of retroactivity of compensation at this late date.

THE COSTING STANDARD

Section 402(a) provides, as pertinent, that "In fixing just and reasonable compensation for the provision of services . . . the Commission shall, in fixing compensation in excess of incremental costs, consider the quality of service as a major factor in determining the amount (if any) of such compensation." The term "incremental" was deemed equivalent to "avoidable." H.R. Rep. No. 415, 93 Cong. 1st Sess. 6, 11 (1973).

Thus, the proper costing standard to be used in section 402(a) proceedings is avoidable costs. By avoidable costs we mean the costs that would not be present if a minority user's service were eliminated. The use of an avoidable costing approach puts the dominant user in a position no better or worse than if the minority user had not been present.

Our analysis is based on the standards found in the Commission's decision in *Costing Methodologies, N.E. Corridor: Commuter Serv.*, 367 I.C.C. 192 (1983) (*Costing*). Under this methodology, we determine the dominant user and then allocate expenses on an avoidable cost basis. Metro-North is the dominant user because it owns and operates the Metro-North Commuter Railroad and operates more trains than Amtrak. Amtrak is a minority user because it operates over Metro-North's leased railroad lines and operates only a small percentage of the total trains operating on the line.

Conrail is also a minority user because it operates freight service over a part of Metro-North's railroad. Although the *Costing* rules call for the sharing of avoidable costs between or among minority users, we cannot determine Conrail's avoidable costs, if any, from the record.

Amtrak recognizes that to the extent that the *Costing* standards are premised on avoidable cost principles, the conceptual approach of the decision is consistent with the incremental cost standard of section 402(a). However, to the extent that the Commission departed from the principles of strict avoidability in *Costing* Amtrak contends that those standards are inapplicable in a proceeding that is governed by the express language of section 402(a). Our determination on just and reasonable compensation is premised on avoidable costs, as required by Section 402(a). The *Costing* procedures have been used only as a basis to determine those costs that are avoidable. Application of the methodology in *Costing* will result in an equitable base payment by Amtrak and will place Metro in a no better or no worse position than if Amtrak did not make use of Metro's facilities. Later in this decision we consider the quality of service issue as it relates to incentive and penalty compensation.

In determining the compensation due Metro under section 402(a), we are able only to prescribe a general methodology. We cannot calculate a specific dollar amount because the record is not sufficient to enable us to do so.

I. GRAND CENTRAL TERMINAL REAL ESTATE RENTALS

Metro contends that Amtrak uses various space in GCT that otherwise would be rented to other parties. It contends that the Amtrak ticket office is prime station space and should have earned $190,000 or $475 per square foot in 1984. It cites a nearby location in GCT that it contends is inferior, that rented for $400 per square foot. Metro also contends that the locations currently used by Amtrak as a baggage room, red cap room, employee rest facility, and commissary could also be rented to others as storage space for between $10 and $15 per square foot. Finally, Metro contends that an Amtrak sign would yield $15,000 in 1983, $17,000 in 1984, and $19,000 in 1985 if rented to another party.

Amtrak claims that the space and facilities used by it at GCT as well as Croton-Harmon and Poughkeepsie were never conveyed to Metro, but, rather, are now vested in Conrail for Amtrak's use and have been used by Amtrak without charge since 1971. Specifically, Amtrak contends that it is not obligated to pay for GCT facilities because of the terms of the Harlem-Hudson Lease Agreement between MTA and the Penn Central Trustees. Copies of the Harlem-Hudson Lease Agreement and the Harlem-Hudson Lease were submitted. By this agreement and lease the Trustees leased the GCT station building and related transportation properties to MTA for 60 years, with the right to renew the lease for up to six additional terms of five years each. In Section 301 of the agreement the trustees reserved from the leased premises all rights necessary to enable the lessor to perform its

obligations, and Amtrak to exercise its rights, under the "Amtrak Agreement," meaning Amtrak's basic agreement with Penn Central, dated April 16, 1971. Thus, Amtrak contends, by virtue of this lease provision, the space Amtrak occupies at GCT was reserved from the lease to MTA for Amtrak's benefit. The lease further reserved from the conveyance the right to operate long-haul (through) passenger trains serving GCT, Croton-Harmon, and Poughkeepsie and to occupy and use such portions of stations, buildings, shops, and other facilities within the leased premises that are reasonably necessary or legally required for providing railroad passenger or freight service. These reserved rights to use the GCT, Croton-Harmon, and Poughkeepsie stations without charge (other than incremental utility expenses at GCT) were thereafter converted to Conrail pursuant to the U.S.R.A. *Final System Plan,* Vol. 1, p. 261 (1975). Amtrak states that since April 1, 1976, it has continued to use platform and other space at GCT, Croton-Harmon, and Poughkeepsie under its off-corridor operating agreement with Conrail. Amtrak also submits that in 1976 MTA acknowledged, after the conveyances to Conrail, that Amtrak's use of free space at GCT that it had occupied since 1971 was "rent free" and at "no rental charge." Amtrak contends that Metro has no right to interfere with its use of space at GCT inasmuch as the leasehold interest of MTA and its subsidiary Metro-North does not include the space required for Amtrak's operations. Amtrak further contends that even if Metro owned the space in question, the rental value claimed by Metro is in excess of the true rental value of those facilities.

While Metro claims that it has a proprietary interest in the space occupied by Amtrak at GCT, it has submitted no basis for this contention. Amtrak, on the other hand, has submitted specific evidence that shows that the space it occupies at GCT is not subject to the Harlem-Hudson Lease. Based on our analysis of the

record, and the lease in question, we conclude that Metro does not own or lease the space in question and is not entitled to compensation for rental of that space.

II. USE OF TRACK AND FACILITIES ON THE HUDSON LINE

Metro's FUP for GCT and the Metro-North Railroad west to Poughkeepsie assumes a slight re-scheduling of Metro rush hour train services and no Amtrak operations. The FUP calls for no elimination of facilities in GCT or between GCT and Spuyten Duyvil, a point approximately 11 miles west of GCT. The major change in the FUP involves changing the railroad between Spuyten Duyvil and Croton-Harmon from four tracks to two tracks and modifying existing tracks to enable operation of the revised Metro only schedule. Metro estimates a one-time expense of $4,416,965 for making the changes shown in its FUP. Metro asserts that, absent all Amtrak trains, it could operate this portion of the Hudson Division with two tracks and a minor rescheduling of its own rush hour trains. It proposes a new rush hour schedule calling for changes in train arrival or departure times at GCT of nine minutes for one train, seven minutes for one train, and six minutes for two trains. Eighteen rush hour trains are rescheduled by one to five minutes while the arrival or departure times of 27 trains do not change at all. No non-rush hour changes are proposed. Metro compares the re-configured Hudson line with its own Harlem Division, and cites higher train and passenger volumes on the Harlem Division. Between Spuyten Duyvil and zone GD, a distance of approximately 5 miles, the FUP calls for the elimination of 4.87 miles of one track, one turnout, and related signaling and electrification. Between zones GD and OW the FUP calls for the elimination of 8.4 miles of Track No. 2, 7.3 miles of Track No. 1, and 0.2 miles of Track No. 5 and related turnouts, signals, and electrification. The FUP eliminates 8.78

miles of Track No. 2 and 6.72 miles of Track No. 1 between zones OW and HM (Croton-Harmon) as well as related signals and electrification. The FUP changes very little of the Metro-North Railroad west of Croton-Harmon. A total of 6.55 miles of track and related signals and turnouts are scheduled for elimination. A short portion (1.09 miles) of electrification is also scheduled to be eliminated.

Metro concedes that its maintenance expenses east of Spuyten Duyvil and west of Croton-Harmon are not avoidable to Amtrak, although it does contend that it incurs increased expense because of Amtrak's operations.

Metro contends that there are two categories of maintenance for which costs must be attributed to Amtrak. The first category is program maintenance from the 29-mile segment between Spuyten Duyvil and Croton-Harmon where base costs are avoidable to Amtrak because of the reduction from four to two tracks. This category includes scheduled maintenance of the railroad. The second is the basic maintenance of the same line segment and includes such items as spot tie replacement.

For the segment between Spuyten Duyvil and Croton-Harmon, Metro-North calculated the avoidable expenses or programmed maintenance (shown in 1985 dollars) on the basis of track miles. In this calculation, the same expenses per mile of track are applied to the current four-track railroad and to the two-track railroad described in the FUP. Total avoidable costs under this calculation are $1,490,584.

The avoidable expenses of basic maintenance were developed by converting all Metro-North track between zones MO and CD into equated track miles using procedures contained in the American Railway Engineering Association (AREA) Manual for Railway Engineering. A basic maintenance cost per equated track

mile or unit cost was then developed by dividing the total basic maintenance expense by the total equated track miles. This unit cost was then applied to the two-track and the four-track configurations to obtain the total avoidable basic maintenance cost.

Metro contends that although Amtrak is the dominant user of five GCT tracks it is not the only user and these tracks are not absolutely avoidable. Metro states that it provides prime track space to Amtrak and that, absent just and reasonable compensation, Amtrak may have to be reassigned to another part of the terminal where dedicated use can be better ascertained and recorded.

Amtrak contends that there are no avoidable tracks or facilities involved in its operation over the Metro-North Commuter Railroad. It observes that present Metro-North train schedules require all four tracks between Spuyten Duyvil and Croton-Harmon because faster trains pass slower trains during the morning and evening rush hour periods. Amtrak also observes that the automatic block signal system on this line segment provides for movements in one direction only. All reverse movements require train orders under absolute block protection. It also contends that it does not have the exclusive use of any GCT tracks and that, although its operation is normally limited to five upper level tracks, these tracks are also used by Metro trains. Amtrak also contends that Metro's cost estimate is overstated because the estimate includes expenses that were not shown to be avoidable by EUP's.

Amtrak contends that Metro's two-track proposal is impracticable because it could only be achieved by downgrading Metro-North service for most customers. It further argues that Metro does not own the tracks at issue, and may not dispose of them. Rather, according to Amtrak, Metro leases this track from Penn Central and, by the terms of its lease, is obligated to maintain the

track "at a level of utility which shall permit, the operation of a suburban mass transit service and shall permit Penn Central to operate the types of freight and passenger trains which were considered conventional on January 1, 1969 . . . thereon at speeds prevailing and to the load capacities existing as of January 1, 1969." Harlem-Hudson Lease Agreement, section 402. Amtrak notes that expressly reserved from the lease were free trackage rights for passenger and freight operations, which rights were transferred to Conrail by the Final System Plan,[2] and remain valid today.

Amtrak submits that absent a demonstration that both Penn Central, as fee owner, or Conrail, with user rights, would consent to the retirement of the track in question, no portion of the track can be found to be avoidable as to Amtrak. Amtrak further contends that since none of the tracks on the Hudson Line are avoidable to Amtrak, Metro is not entitled to any return on investment on these facilities. Amtrak proposes that it contribute toward track maintenance based on the Speed Factored Gross Ton Miles Formula (SFGT). Amtrak has also agreed to invest $6 million toward rehabilitation of a four track system because it is important to correct deferred maintenance at this time. Amtrak argues that these contributions fully and fairly compensate Metro for any incremental track maintenance costs that may be attributable to Amtrak's presence.

In *Consolidated Rail Corp.* v. *Metro-North Commuter R.R.*, 598 F. Supp. 1571, 1582 (Spec. Ct. R.R.R.A. 1984), the Special Court concluded that section 504(f) of the RPSA did not impose a statutory burden on Conrail and Amtrak to pay for what the Harlem-Hudson Agreement entitled them to retain free. The court concluded that the freeing of Amtrak Commuter from the obligation of the Harlem-Hudson Agreement, to which Conrail

[2] *U.S.R.A. Final System Plan,* Vol. I. P. 264 (1975)

had been made subject, did not deprive Conrail and Amtrak of trackage rights needed for the operation of their respective passenger and freight service. The court found that the direction "Compensation for such trackage rights shall be just and reasonable," should be read as applying only when compensation is due. The court stated that if a person is legally entitled to use something free, requiring him to pay any compensation is not just and reasonable.

While Metro maintains that it has the ability to make the track modifications it proposes, Amtrak has shown that this is not the case. There is no showing by Metro that it could procure the consent of Penn Central or Conrail to make modifications to the track. In the absence of such a showing, we cannot find that Metro should be compensated for Amtrak's use of the track and facilities on the Hudson line.[3] We will, however, direct Amtrak to contribute toward track maintenance in an amount determined under the SGTF formula.

III. OTHER COST ITEMS

Metro has developed costs for various positions and functions that it argues should be charged to Amtrak. These include a number of overhead costs such as vacation and holiday relief, railroad retirement and health insurance costs, and various departmental and general overheads. Under the *Costing* rules only the avoidable costs may be included. Departmental and general overhead costs are avoidable only if the EUP properly shows them to

[3]Further, Metro's methodology and its resultant cost estimate is unacceptable because it does not develop an avoidable cost. Under the *Costing* rules the basis for the calculation of the costs attributable to the minority user or users are based on the positions identified in the EUP and the facilities identified in the FUP. Avoidable track related expenses must be based on the Speed Factored Ton Miles (SGTF) formula as applied to the various track accounts.

be so. Since Metro has filed a EUP showing only GCT switch crews and Dispatchers' Office positions, we cannot assume that any departmental or general overhead costs are avoidable.

A. Ticket Clerks at Croton-Harmon and Poughkeepsie

Amtrak tickets are currently sold by Metro-North staff at Croton-Harmon and Poughkeepsie. Amtrak currently pays for one seven-day position at each of these points. Amtrak tickets are not sold by Metro staff at any other points.

Metro contends that it is not obligated to sell Amtrak tickets. It offers Amtrak the choice of either accepting its own study of the cost of ticket sales and paying on that basis, or renting space from Metro and employing its own ticket sales staff. It contends that (a) training ticket sellers to sell Amtrak tickets takes three weeks longer than training for Metro ticket sales alone; (b) the time required to sell an individual Amtrak ticket is substantially longer than the time required to sell a Metro ticket; and (c) the recording of Amtrak receipts take five times as long as the same procedure for Metro-North receipts. It further contends that it would not open the Croton-Harmon or the Poughkeepsie ticket office on weekends if Amtrak trains were not operating. No redeployment of ticket sales staff is shown in Metro-North's EUP.

Other than observing that it and Amtrak have agreed that certain positions are avoidable, no EUP showing ticket sales positions is offered.

Amtrak has agreed to one seven-day ticket sales position as avoidable at both Poughkeepsie and Croton-Harmon. It observes that no EUP showing these positions has been presented and that Metro calculations include both employee fringe benefits, which are properly avoidable, as well as other overhead items such as maintenance and security costs, which, absent a showing of

avoidability, should not be included. Amtrak concludes that Metro-North's failure to provide an EUP or any other evidence of avoidability indicates that there are no avoidable positions or avoidable costs in the station area.

We have reviewed Metro's study of the cost of ticket sales. It is a fully-allocated cost rather than an avoidable cost study. It does not identify the number or the cost of additional positions needed to sell Amtrak tickets or the additional cost of training a Metro ticket seller for the job of selling Amtrak tickets. Based on the evidence of record, we cannot determine the avoidable cost of Amtrak ticket sales by Metro. We will, therefore, direct Amtrak to continue to pay the wages (including fringe benefits) of one seven-day clerk at each station.

B. Report Clerks

Both Metro and Amtrak agree that the two report clerk positions in the Chief Dispatcher's Office at GCT are avoidable. These positions along with appropriate vacation and holiday relief are properly chargeable to the Amtrak operation. Overhead costs such as security and maintenance are not properly included because no claim or showing of avoidability has been made. We will, therefore, direct Amtrak to pay the wages (including fringe benefits) of two five-day reporting clerks.

C. Grand Central Switching

Metro contends that two of the four current GCT switch crews could be eliminated if Amtrak trains were to cease operating. It submitted the work program of the four GCT yard crews. This program shows two crews doing Amtrak-related work exclusively, and notes that one of the two remaining crews does not have enough time to handle any Amtrak work in addition to Metro-North switching.

Amtrak contends that the volume of work at Grand Central Terminal has not changed since 1982 when both parties determined that Amtrak-related switching required about 47 hours per week. Amtrak's reevaluation of GCT switching totals 42 hours and 30 minutes of Amtrak-related switching per week. Amtrak is willing to pay for 47 hours to cover any miscellaneous switching that may occur.

Although Metro-North and Amtrak both agree that there is avoidable switching expense for Amtrak's operations, they disagree on the method of calculating that expense and the amount of avoidable switching.

The *Costing* rules allow the dominant user to structure its switching operation in the most efficient manner for the conduct of its own operations. The issue in determining the avoidable cost of GCT switching is not the time consumed by Amtrak's operations but the additional crew, crews, or overtime needed after Metro conducts its own operations. Metro's description of switch crew duties is persuasive. Two of the four GCT switch crews (GCT Yard Number 2 and Number 4) are avoidable for Amtrak operations. Amtrak has offered no rebuttal to Metro's scheduling of switch crews. We will, therefore, direct Amtrak to pay for the cost of two switch crews at GCT.

D. Engine Change-Out at Croton-Harmon

Metro contends that its cost of providing engine "change out" service for Amtrak at Croton-Harmon was $87,140 in 1983, $67,020 in 1984, and will be $71,710 in 1985. These calculations include fringe benefits and overtime. No avoidable positions for this function are listed in Metro's EUP.

Amtrak contends that there are no avoidable positions connected with this function. It contends that a review of Metro's working papers shows that Amtrak trains Nos. 48 and 49 were handled

daily and trains Nos. 63 and 64 were handled an average of two times per week during a November 1984 test period, for a total of no more than one hour of Amtrak involved time on most days and two hours on other days. Amtrak concludes that at this level of activity, avoidable positions would be unlikely. We have reviewed Metro-North's exhibit and determined that while it shows an estimate for inbound and outbound "change outs", neither that exhibit nor Metro-North's EUP shows any avoidable positions for this function. And, based on the lack of available cost evidence, we cannot conclude that there is any avoidable expense for this operation.

E. Refuse Removal at Grand Central Station

Metro contends that Amtrak trash is disposed of in two ways. Commissary trash is loaded into containers and removed on a six-days per week basis at a cost of approximately $2,100 per month. Train trash is collected in containers and hauled to Croton-Harmon along with Metro trash four or five times each week. Metro claims that the costs related solely to Amtrak include container rental at $140 per week and dumping at a cost of $253 per container dump. It observes that the crew performing this service is not avoidable. Although the car used for Amtrak trash could be redeployed, no claim is being made for car costs. Metro suggests that Amtrak arrange for the removal of its own trash.

Amtrak has agreed to pay the charges paid for container rental and dumping of its train trash, subject to the verification of the volume of Amtrak-related activity.

On an avoidable cost basis the cost of container rental and dumping are avoidable costs. No other expenses have been shown to be avoidable. We will, therefore, direct Amtrak to pay the applicable container rental and contract dumping charges applied to the units and services required by Amtrak at GCT.

F. Metered Electricity, Grand Central Station

Metro has installed sub-meters for the Amtrak commissary and for a 480 volt standby power facility. It states that it will also install meters for the Amtrak ticket office and other unmetered Amtrak facilities and render a bill.

While Amtrak previously agreed to pay a metered rate, in its most recent submission Amtrak contends that it should pay only the avoidable components of the utility bill and not the fixed portion of the bill.

Amtrak's offer to pay the metered rate for the avoidable portion of the utility bill is an acceptable basis of determining this charge under the *Costing* rules. We will, therefore, direct Amtrak to pay the metered kilowatt hours multiplied by the utility rate applicable to Amtrak's incremental usage.

G. Third Rail Electricity at GCT

Metro notes that it is considering requiring the use of meters on all Amtrak locomotives using its third rail GCT operation. It claims that Amtrak's proportionate use of this facility results in a utility charge (including an energy charge, demand charge, wheeling charge, and a gross receipts tax), as well as costs of maintenance of the power transmission system and the third rail itself. No avoidable cost study of third rail use was submitted by Metro.

Amtrak previously has offered to pay for only the charge per kilowatt hour only. It now contends that the power charge proposed by Metro-North includes not only the cost of power purchased, but also third rail power transmission system maintenance and operation costs and return on investment on the power system. It contends that only the demand charges are avoidable costs, and other base costs should be borne by the dominant user.

Since no study of avoidable third rail facilities or costs was submitted, we cannot determine the avoidable cost, if any, of these facilities. The only charge that has been justified on an avoidable cost basis is the avoidable kilowatt-hour cost of electricity. We will, therefore, direct Amtrak to pay for its electrical consumption multiplied by the utility rate applicable to Amtrak's incremental usage.

H. Timetable Printing

Metro claims an expense of $19,275 for 1983, $20,715 for 1984, and $22,260 for 1985 based on a percentage of total costs. Amtrak has offered to pay the full cost of supplemental timetable pages when changes are occasioned solely by Amtrak and a share (based on the number of pages containing changes for each party) of the cost of printing joint changes. It contends that the timetable printing bills can be divided into the components of set up charges and printing and the avoidable cost would be the difference in the bill for the current timetable and the timetable required for Metro services. This charge, Amtrak argues, could be determined either by a special study or agreement.

Metro's cost estimate is not allowable because it is a fully allocated cost rather than the avoidable cost that must be developed under *Costing.* Amtrak's proposed solution is acceptable under these rules. We will direct Amtrak to pay the additional set-up and printing costs incurred by reason of Amtrak schedule changes on the Hudson Line.

I. Car Washing

Metro contends that Amtrak should pay a pro-rata share of the cost of its car washing facility because, based on an analysis of actual 1984 data, Amtrak cars accounted for 36.8 percent of all cars

passing through the washer. No estimate of avoidable labor or materials for the car washing were included in the EUP or the FUP.

Amtrak observes that the car washing facility is run by one employee on a 7-day per week basis and contends that it would be unlikely that any position would be abolished as the result of the removal of its trains.

Since no estimate of either the avoidable labor or the avoidable material has been furnished, we cannot determine how much expense, if any, would be eliminated if Amtrak's operations were to cease.

J. Collisons and Claims

Metro asserts that it does not intend to renew the present contract with Amtrak for claims or damages. It contends that all costs that arise out of claims or damages that would not have been sustained if Amtrak did not operate on the Hudson Division are avoidable to Amtrak.

In pleadings filed prior to Metro's final statement, Amtrak observed that Commission action is not required at this time because the current agreement has been extended. Amtrak is unwilling to assume full responsibility for all liability, regardless of fault, for accidents involving its trains. Amtrak suggests the use of its standard agreement with other railroads as the proper standard. It contends that the Metro proposal would place Amtrak in a worse position than if there had been no agreement at all. Amtrak contends that some retention by Metro of the risk for operating trains safely is desirable for safety reasons.

Costing assigns the cost of insurance to a minority user on the basis of the insurance underwriter's estimate of the avoidable portion of the insurance preminum while clearing wrecks, and

damage to property is assigned on an actual basis. Amtrak's proposal is a good common sense solution that comports with the spirit of the rules. Under this agreement Amtrak would be responsible for all costs except those occasioned by Metro. Accordingly, we will direct that, unless the parties otherwise agree, the apportionment of liability for the operation of Amtrak trains on the Hudson Line will be as stated in Amtrak's standard agreement with other railroads. See *Amtrak and Tex. and P. Ry. Co., Just Compensation,* 348 I.C.C. 645, 674-676 (1976).

IV. QUALITY OF SERVICE

This factor must be considered because section 402(a) requires the Commission to consider quality of service as a major factor in determining the amount (if any) of compensation in excess of incremental costs. In *Costing* at 195, the Commission did not incorporate a procedure specifying quality of service payments, but left the matter to negotiation between the parties. However, in order to comply with the mandate of section 402(a), a performance standard must be adopted.

Amtrak has proposed a method under which incentives are paid for each percentage point by which on-time performance of a train exceeds 80 percent in a month, and penalties are assessed for each percentage point by which on-time performance of a train is less than 70 percent in a month. Penalties may not exceed the amount of incentives earned by the railroad in connection with the operation of all Amtrak trains in the preceding 12 months, so over time there is no risk that a railroad could ever receive less than its avoidable costs in connection with the operation of Amtrak trains. Amtrak notes that it has included similar incentive arrangements in operating agreements with freight railroads over whose lines its trains operate. Amtrak further notes that Metro's practice of consistently granting preference to its own

commuter trains over intercity passenger trains has contributed to an unacceptable on-time record for Amtrak trains operating over Metro-North tracks. Amtrak requests that the Commission require that Metro provide equal priority to Amtrak's scheduled passenger trains.

Metro did not submit an alternative to Amtrak's proposal for incentive payments for quality performance.

We agree that quality of service payments would benefit Amtrak by giving Metro an incentive to improve its service. Therefore, we will adopt the quality of service standards proposed by Amtrak. Those standards are set forth in the Appendix. In light of our adoption of Amtrak's performance standards, we do not find it necessary to direct Metro to provide equal priority to Amtrak's scheduled passenger trains.

Because Amtrak service over the Hudson Line is being operated pursuant to an interim agreement with Metro, and because section 402(a) directs us to order provision of services or the use of tracks and facilities of the railroad by Amtrak, our decision will also include a direction to Metro to permit the continued use by Amtrak of the rail lines and associated facilities on the Hudson Line and to provide necessary services on such properties in connection with Amtrak operations.

V. RETURN ON INVESTMENT

Metro argues that it is entitled to a return on investment, A return on the value of avoidable properties is permitted by *Costing,* at 215. However, here we have determined that none of Metro's properties are avoidable. Therefore, there is no property that is avoidable requiring Amtrak to pay Metro a return on investment.

VI. RETROACTIVITY

Finally, as apparently agreed by the parties the compensation provisions established in this decision will apply retroactively to January 1, 1983. The performance incentive payments will only apply prospectively.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The motion for oral hearing is denied.

2. Metro-North Commuter Railroad and the Metropolitan Transportation Authority will continue to make available to Amtrak (a) the space and facilities now used by Amtrak at Grand Central Station, Croton-Harmon Station, and Poughkeepsie Station, and (b) all trackage and related facilities between Grand Central Station and Milepost 75.8 on the Hudson line.

3. Metro-North will continue to provide the following services, so long as requested by Amtrak:

(a) The sale of tickets at Croton-Harmon and Poughkeepsie;

(b) Engine exchange at Croton-Harmon;

(c) Yard switching at Grand Central Terminal;

(d) Trash and garbage removal at Grand Central; and

(e) Exterior car-washing at Grand Central.

4. Unless the parties otherwise agree, the apportionment of liability for the operations of Amtrak trains between Grand Central and Poughkeepsie will be as stated in Amtrak's standard agreement with other railroads. *See Amtrak and Tex. P. Ry. Co., Just Compensation,* 348 I.C.C. 645, 674-676 (1976).

5. For the services, tracks, and other facilities provided, Amtrak must pay, retroactive to January 1, 1983, the following:

(a) For track maintenance, the amount as determined under the SFGT formula;

(b) For clerical work, the wages (including fringe benefits) of two five-day reporting clerks;

(c) For the sale of tickets at Croton-Harmon and Poughkeepsie, the wages (including fringe benefits) of one seven-day clerk at each station;

(d) For switching at Grand Central Terminal, the cost of two switch crews;

(e) For trash and garbage removal at Grand Central, the applicable container rental and contract dumping charges applied to the units and services required for Amtrak;

(f) For the use of electricity at Grand Central, the metered kilowatt hours multiplied by the utility rate applicable to Amtrak's incremental usage;

(g) For the use of third-rail electricity entering and leaving Grand Central, the electricity consumed by Amtrak multiplied by the utility rate applicable to Amtrak's incremental usage; and

(h) For employee operating timetables, the additional set-up and printing costs incurred by reason of Amtrak schedule changes on the Hudson line.

For any other services provided at Amtrak's request, Metro-North will be reimbursed for the incremental costs incurred for labor and materials, if any.

6. Amtrak is directed to pay Metro-North performance payments as set forth in the appendix.

7. The parties, by mutual agreement, may amend the terms and conditions set forth above.

8. This decision is effective 30 days from the date of service.

By the Commission, Chairman Taylor, Vice Chairman Gradison, Commissioners Sterrett. Andre, Simmons, Lamboley, and Strenio. Commissioner Lamboley commented with a separate expression. Chairman Taylor dissented in part with a separate expression.

James H. Bayne
(SEAL) Secretary

COMMISSIONER LAMBOLEY, commenting:

In my view Metro-North should have been at least afforded an opportunity to submit verified rebuttal evidence in response to certain disputed issues raised in Amtrak's reply.

CHAIRMAN TAYLOR, dissenting in part:

I would have allowed Metro-North the opportunity to submit in affivavit form, its rebuttal evidence relative to the contentions made in Amtrak's reply statement.

Appendix

Quality of Service Standard

Performance payments will be paid when the on-time performance of all trains is greater than 80% during any month. Performance penalties will be assessed when on-time performance falls below 70% during any month. Calculation of performance payments and performance penalties will be made on the following basis:

A. Performance Calculations.

Percentage on-time performance of the trains operated between Grand Central Station and Poughkeepsie during a contract month will be calculated by dividing the number of trips completed on time by the number of trips operated during the contract month by the trains.

1. A trip of a northbound train is considered on time if it arrives at Poughkeepsie on or before the scheduled arrival for such train plus a 5 minute tolerance. The scheduled arrival time of a train shall be as specified in Amtrak's public timetables. A trip of a southbound train is considered on time if it runs between Poughkeepsie and Grand Central Terminal within the amount of running time shown in Amtrak's public timetables plus a 5 minute tolerance. Such timetables may be modified by mutual agreement of the parties.

2. Metro-North will be granted an additional allowance in the calculation of schedule adherence on northbound trains equal to the minutes of delay in train operation caused by passenger-related holds which are expressly ordered by Amtrak personnel.

3. A train which is annulled or terminated by Amtrak or another Amtrak operating railroad for reasons not related to conditions on rail lines of Metro-North, will not be counted, as an on-time trip, nor will it be counted as an operated trip in calculating the on-time performance of the trains.

4. A train that is annulled or terminated because of conditions that exist on rail lines of Metro-North will be considered as "late" and "operated" for purposes of calculating on-time performance.

5. A special train, an extra train over the same route, or a section of a scheduled train that is requested by Amtrak, will not be counted in on-time performance calculation.

B. Calculation of Performance Payments.

The on-time performance payment for a month is calculated as follows:

1. Subtract 0.800 from the on-time performance for the trains for the month as determined pursuant to A. above (carried out to three decimal places);

2. Multiply the resulting amount by $925; and

3. Multiply that resulting number by the number of trips operated by the trains during the month.

C. Calculation of Performance Penalties.

The performance penalty for a month is calculated as follows:

1. If the on-time performance for the trains for a month is less than 70%, subtract 0.700 from the one-time performance for the train as determined pursuant to Part A above (carried out to three decimal places). This will result in a negative number;

2. Multiply the resulting negative number from Step 1 above by $925.

3. Multiply the resulting number by the number of trips operated by the trains during the month.

D. Remittance of Performance Payments.

Payments for schedule adherence by all Amtrak trains operated by Metro-North calculated as provided in Part B will be paid to Metro-North monthly. In accordance with Part C, for any month for which on-time performance is less than 70%, a penalty, which shall not exceed the net amount of incentives earned by Metro-North the preceding 12 months, shall be paid to Amtrak by Metro-North.

Const. art. III, §1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeapardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rail Passenger Service Act of 1970, Sec. 402(a), as amended*

(a) Contracts with railroads or regional transportation agencies; authority of Interstate Commerce Commission; fixing of compensation; agreements with State, local or regional transportation agencies; disagreement procedures; criteria for compensation

The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree, which terms shall include a penalty for untimely performance. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad or agency under such order or under an order issued under subsection (b) of this section shall be conditioned upon payment by the Corporation of the compensation fixed by the Commission. In fixing just and reasonable compensation for the provision of services or for the use of tracks and facilities ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation. If the amount of compensation fixed is not duly and promptly paid, the railroad or agency entitled thereto may bring an action against the Corporation to recover the amount properly owed. Notwithstanding any other provision of this chapter, the Corporation may enter into agreements with any other railroads and with any State (or local

*Does not include amendments made by Consolidated Omnibus Budget Reconciliation Act of 1985, effective April 8, 1986. See discussion in Petition, p. 23, n. 29.

or regional transportation agency) responsible for providing commuter rail or rail freight services over tracks, rights-of-way, and other facilities acquired by the Corporation pursuant to authority granted by the Regional Rail Reorganization Act of 1973 and the Railroad Revitalization and Regulatory Reform Act of 1976. In the event of a failure to agree, the Commission shall order that rail services continue to be provided, and it shall, consistent with equitable and fair compensation principles, decide, within 180 days after the date of submission of a dispute to the Commission, the proper amount of compensation for the provision of such services. The Commission, in making such a determination, shall consider all relevant factors, and shall not permit cross subsidization among intercity, commuter, and rail freight services.

United States Railway Association

Final System Plan

Volume I

VOLUME I (Parts I and II)

United States Railway Association
FINAL SYSTEM PLAN
for restructuring
Railroads in the Northeast and Midwest Region
pursuant to the
REGIONAL RAIL REORGANIZATION ACT OF 1973

JULY 26, 1975

Foreword

With the submission of the Final System Plan (FSP), the United States Railway Association (USRA) meets its most important obligation under the Regional Rail Reorganization Act of 1973. The FSP is the culmination of many months of intensive study and planning, involving not only the Association but organizations and individuals throughout the general public, private industry, labor and federal, state and local government's. Publication of the FSP is a major step in the intricate process prescribed by the Act for reorganizing and restructuring bankrupt railroads in the Northeast and Midwest.

The FSP has been built upon the Preliminary System Plan (PSP) issued by the Association on February 26, 1975. It reflects USRA's consideration of the information, data and commentary submitted in response to the PSP. In developing the FSP, the Association carefully considered the results of the Rail Services Planning Office (RSPO) hearings and its evaluation of the PSP, as well as continuing efforts of the Association's staff. USRA also has collected and refined relevant data to develop more fully the aspects of the rail service plan which were still tentative on February 26. The FSP takes into account all the information received since publication of the PSP and provides a more specific resolution of the major issues involved in restructuring the rail system in the 17 state Region.

FSP Service Recommendations

The FSP establishes a program for providing an adequate and economically self-sustaining regional rail system for the Northeast and Midwest, for maintaining the benefits of railroad competition to the public and for creating a ConRail System to consolidate many of the operations of the railroads in reorganization into a new railroad operating in the private sector. One of the goals of the Act, the retention and promotion of competition in

the Region, was difficult because virtually all the smaller carriers in the eastern part of the Region are bankrupt. The preservation of competition required specific steps either to bring other carriers into the area or to create two carriers out of the bankrupt railroads to provide that level of completion.

The Association found the best system could be developed by (1) establishing a Consolidated Rail Corporation (ConRail) comprised of the Central of New Jersey, the Lehigh Valley, the Lehigh & Hudson River, the Ann Arbor and the principal properties of the Penn Central and (2) inviting one or both of the major solvent carriers in the Region (the Chessie System and/or the Norfolk & Western) to provide competition to ConRail in many markets formerly served by the Reading, Erie Lackawanna and the Central of New Jersey. Alternative through service between New England and the west and the south could be provided effectively by extensions of the Delaware & Hudson to junction points servied by one of these two carriers.

Since publication of the Preliminary System Plan, the Association has held many discussions with these carriers in efforts to achieve the PSP's recommendations. It is hoped that agreement can be reached with the Chessie System to bring that carrier into the eastern part of the Region on the schedule mandated in the Act. Similarly, USRA hopes that the Delaware & Hudson will accept offerings which would extend it to appropriate route junction points with both the Chessie and the Norfolk & Western. Competition and service also will be enhanced throughout the Region by scores of joint industry projects and other route changes approved in the FSP. Thus, the regional system will consist of three large carriers, ConRail, Chessie and the Norfolk & Western, supplemented substantially by the services of the smaller carriers. The new ConRail System will be the largest carrier in the Nation, as was Penn Central.

Finance

ConRail can be developed into a financially self-sustaining corporation provided certain preconditions are met.

- It must be relieved of extensive losses from unprofitable passenger and light density line operations as well as from the carriage of certain commodities which do not pay their way.
- Its pricing policies must be granted a greater degree of flexibility than has existed in the past.
- Government financing must supplement the private sector financing and internally generated funds necessary to fund ConRail's rehabilitation program, its early operating losses and its working capital requirements.
- Repayment of federal funding and the payment of interest or dividends on government financing must be related to ConRail's cash flow and cannot be a burden during the early years of its reorganization.

If these underlying conditions are met, a revitalized, profitable company can be brought into being. ConRail will be ready to provide efficient rail service essential to the economy of the Region and the Nation.

ConRail's ultimate self-sufficiency depends on federal capital assistance of at least $1.85 billion. USRA's financial analysis concludes that financial self-sufficiency cannot be achieved if ConRail is required to carry any form of federal funding which requires it to make cash payments of interest or dividends in the earlier years.

The PSP did not discuss the issues of a ConRail capital structure or the valuation of the assets of the railroads in reorganization. The Association now proposes a capital structure that provides for federal investment of $1.85 billion in Debentures and Preferred Stock as well as additional equity securities for the bankrupt estates. USRA also proposes that $250 million be appropriated to USRA as a financing margin of safety for ConRail

and an additional $400 million be authorized to be used in the discretion of the Secretary of Transportation to further the purposes of the Act. This financial participation should permit an income-based reorganization of the bankrupt railroads.

In this regard, the Association reiterates that ConRail should be able to achieve a level of profitability about equal to the average for the larger carriers in the industry. That average, however, is substantially below the level of profitability achieved by American industry generally and below the level required to compete effectively in the private money markets.

The Act contemplates implementation of the FSP if neither House of Congress passes a resolution rejecting it within 60 calendar days of continuous session. As noted above, the FSP requires financial assistance beyond that currently provided by the Act and, therefore, additional legislation will be necessary for its full implementation. It also will be necessary to submit other amendments to the Act to meet essential objectives in the reorganization process. For example, USRA is now persuaded that to ensure competition in the eastern seaboard markets, it will be necessary to protect the Chessie System from any possible court judgment retroactively increasing the compensation it gives the estates in return for its major acquisitions.

Light Density Lines

Among the most sensitive issues raised during the planning process was that of light density or branch lines. The Act and its legislative history clearly obligated the Association to test the contribution of those lines to the regional rail system. Under the Act, those lines determined as excess to the system could be continued in service for up to 2 years through the offer of a rail service continuation subsidy.

Following the issuance of the Preliminary System Plan, RSPO held hearings throughout the Region which focused primarily on the light density line issue. Also, since publication of the PSP, the

Association has reevaluated that report's recommendations on light-density lines completely. In the course of that reevaluation. USRA carefully and methodically considered the RSPO evaluation of the Preliminary System Plan and the information submitted in testimony before RSPO or directly to USRA by shippers, members of Congress and other public officials, groups and individuals. The changes made in the Final System Plan in large measure reflect this input.

Some criticism has been directed at the analytic process used by the Association. Many witnesses proposed that all light density lines remain in service for another 2 years to permit a further refinement of the study methods. USRA believes, however, that a compelling rebuttal is embodied in the summary results of the reevaluation. The Final System Plan calls for the exclusion of 6,918 miles of road from the system. These lines comprise 31 percent of the mileage of the railroads in reorganization but handle only 2.2 percent of the freight traffic carried by the railroads involved. These statistics support the analytic method used to evaluate light density lines. The Association is satisfied that further refinement would be of little value.

Future service on light density lines, however, is by no means a closed issue. For example, service on the lines not included in the FSP can be continued in several ways. First, there are the operating subsidy provisions of the Act: implementation in this case rests primarily with the states and local communities. Second, states have an opportunity to purchase many light density lines and arrange for continuing service on that basis. Third, light density lines may be acquired by solvent carriers whose proximity and traffic flows may permit viable service.

Context for Review of the FSP

The Association strongly believes that the FSP presents and adequate, efficient and economically self-sustaining rail system consistent with the goals of the Act. Not all interests will be satis-

fied by this plan. Testimony of public witnesses at the RSPO hearings on the PSP demonstrate the difficulty of balancing certain goals against the others. It would be impossible to meet all claims and demands on the rail system in the Region and unwise to give disproportionate attention to any single set of claims at the expense of other interests. The Association believes that the FSP detailed in this report is a fair and reasonable resolution of the purposes and goals of the Act. Most important, USRA believes the FSP is desirable from the perspective of overall transportation policy.

If ConRail is to be successful it must be launched with the determination in all quarters that it will be just that. No enterprise can succeed unless those responsible for its future are dedicated to achieving the goals set before them. The Association has had to prepare a plan heavily dependent on future projections of uncertain events. USRA projections must be studied with the awareness and understanding that broad underlying assumptions concerning economic conditions, competitive relationships and government policies are crucial to the validity of the forecasts. Detailed implementation of these plans constantly must reflect and respond to changes in the economic environment. Those charged with the responsibility of implementing the plans must be ready to recommend modifications, including such further restructuring and mergers as may be in the public interest.

There are no simple ways to revitalize the railroads in reorganization. The regional rail system described by the FSP will be wholly successful only if the economic environment of the entire rail industry improves. As stated in the PSP:

> "The Association can only plan a system and recommend methods of financial assistance. Others will have to share in the creation of an environment favorable to an economically viable rail system for the nation. The industry itself collectively must do these things which bring about a major improvement in utilization of cars, facilities and equipment.

Future profitability of the industry also will depend in part on increases in productivity of people; organized rail labor must find a way to contribute to that increased productivity. Existing relationships of the Region's railroads to their customers and to the government will have to be altered. Shippers and passengers will have to bear a larger share of the costs of providing rail services. A smaller number of communities and shippers will have to be prepared to forego rail service where the provision of such service is no longer economical and subsidy funds are not forthcoming. In general, a vigorous effort must continue to identify those transport markets which rail serves best and to adapt rail service and operations to such optimal economic functions.

"In addition to the individual and local responsibility described above, federal, state and local governments must be prepared to change their policies toward transportation. Ultimately, economic viability for all transportation is a function of a realistic recognition of the necessity for the industry, and those who use it, to pay its costs and permit it to obtain a reasonable profit. If fundamental changes are not made in these factors and those enumerated above, an alternative is nationalization, a solution no more desirable now than it has been in the past."

ConRail's Future

The Association continues to believe that nationalization of the rail industry must and can be avoided. ConRail is a test case supporting this belief. Its continued existence in the private sector can be ensured only through strong management and the existence of governmental policies which encourage innovation and adaptation. If federal and state governments burden ConRail and other railroads with unprofitable operations or create additional advantages for rail competitors, the effort to create a financially self-sustaining railroad will be stifled.

The Association believes ConRail can succeed as a viable private enterprise and is optimistic that the industry itself will remain in private operation. The public attitude toward the rail

industry is changing from one of hostility or indifference to one of encouragement. With the resurgent use of coal to supply more and more of the Nation's energy needs, rail transportation will become even more important. With society concerned about the fragility of the environment, excessive consumption of petroleum and use of additional land for highway construction, greater recognition will be given to the railroad as a fuel-efficient, land-conserving and low-polluting method of transportation.

Thus, the Association's optimism for ConRail's future is not based solely on government support or new management. There is a changing public attitude toward regulatory policies, energy and the environment, a shift of attitudes that portend a fundamental turning point in the historical relationship between the Nation and its railroads.

ConRail can succeed. The Region can have an adequate rail system. The Nation can have the benefit of a rail industry which, operating in the private sector, serves its full and efficient role in the national transportation system. The Final System Plan is a single, but highly significant step toward achieving these goals for the benefit of the citizens of this Nation.

For the Board of Directors,

Arthur Lewis

ARTHUR D. LEWIS, *Chairman.*

2

Passenger Service

The Association, in its Preliminary System Plan, discussed the quality, present scope and future potential of railroad passenger services in the Region. The PSP made several recommendations designed to eliminate or reduce the many operational and financial conflicts which have characterized the relationships between passenger and freight interests. USRA believes that passenger and most through freight service should be separated in the Northeast Corridor to help implement improved high-speed service. Ownership or lease and control of facilities in the Corridor and elsewhere should become the responsibility of the dominant user.

USRA reaffirms with minor modifications its recommendations for short to medium distance corridor service elsewhere in the Region. The planned rehabilitation of many freight service routes will be an important factor in the continuation and expansion of passenger service on these routes.

Since publication of the PSP, the Association has worked with Amtrak and other agencies to facilitate the Act's goals respecting improved passenger service. For those situations in which designation of rail facilities essential to passenger service can be made in the FSP, USRA has done so. With respect to certain predominantly or solely-related passenger properties outside the Northeast Corridor, legislative amendment will be required. Further action also will be needed to preserve commuter service over certain properties in the Region.

The Regional Rail Reorganization Act of 1973 directs the Association to consider the needs and service requirements of rail passengers, both intercity and commuter, in its plan to restructure rail service in the Region. Among the goals listed in the Act are:

- Establishment of improved high-speed rail passenger service in the Northeast Corridor (Boston to Washington, D.C.), consonant with the recommendations of the Secretary of Transportation in his report of September 1971.
- Efficient movement of both passengers and freight in the Region in a manner consistent with safe operation,
- Efficient and safe commuter rail service as well as intercity service,
- Coordination with the National Railroad Passenger Corporation (Amtrak) and similar entities and
- Identification of all short to medium distance corridors in densely populated areas in which major upgrading of rail lines for high-speed passenger operation would return substantial public benefits.

The responsibility for provision of intercity passenger service resides with Amtrak. As a rule, state and local agencies have the responsibility for development and operation of rail commuter services. They typically receive financial assistance for these services from the federal government's Urban Mass Transportation Administration (UMTA). Railroads in the Region operate rail commuter service in the metropolitan areas of New York, Philadelphia, Baltimore, Washington, D.C., Boston, Providence, Pittsburgh, Cleveland, Chicago and Detroit.

The railroads in reorganization currently operate more than 90 percent of Amtrak's passenger services in the Region and, in the major eastern seaboard metropolitan areas, most of the suburban commuter services. ConRail, as the successor railroad, thus will be an important factor in the continuation and expansion of passenger service. It is imperative that there be cooperation among ConRail, Amtrak and the various commuter agencies to help develop efficient rail passenger service.

USRA's role is to analyze future prospects for rail passenger services in the Region and to assure continued availability of rail facilities that may be required for the proper development of pas-

senger service. USRA has established a series of recommendations aimed at alleviating the major causes of past conflicts between passenger and freight interests. The Association also has taken steps in the FSP to facilitate transfer of passenger facilities and operations from the railroads in reorganization to ConRail, Amtrak, the states and commuter agencies as appropriate.

Summary of Passenger Service Recommendations

Following are brief summaries of the recommendations for passenger service. Details of these recommendations are discussed in subsequent sections of this chapter.

- Passenger and freight traffic on the route between New York and Washington on the Northeast Corridor, optimally, should be separated by providing a parallel through freight route comprised of segments of the Baltimore & Ohio (B&O), Reading (RDG), Lehigh Valley (LV) and Central of New Jersey (CNJ) railroads.

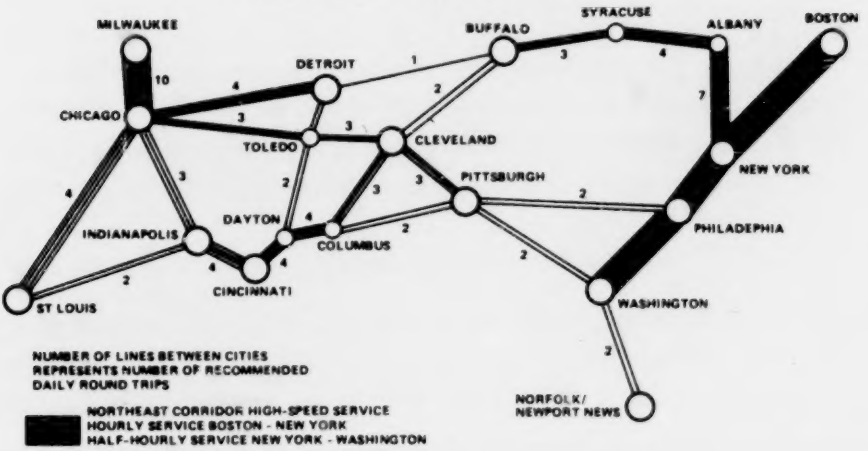
- Amtrak should own or lease and provide the management for Northeast Corridor properties, except for segments already owned or leased by state or local transportation authorities.

- Amtrak and ConRail should agree to a series of cost-sharing principles proposed by USRA which are contingent on Amtrak's purchase or lease of the Northeast Corridor.

- Outside the Northeast Corridor, ConRail should own all lines over which Amtrak operates, except for those already owned or leased by state or local transportation authorities and three lines that USRA proposes Amtrak or state agencies purchase or lease because of dominant or exclusive passenger use: Philadelphia to Harrisburg, Pa., New Haven, Conn. to Springfield, Mass. and Porter, Ind. to Kalamazoo, Mich. Implementation of this proposal would require amendments to the Act. Amtrak, states or public authorities also should have the option to purchase or lease passenger related facilities outside the Northeast Corridor, subject to the concurrence of USRA. In the Final System Plan, USRA is designating to ConRail an option to purchase or lease these

properties, an option which ConRail may exercise if either of two conditions is satisfied. First, ConRail may exercise the option and a state or public authority may acquire ConRail's interest in these properties, if the Act is amended to permit such a transaction. Amtrak may purchase ConRail's interest in such properties located out-

FIGURE 2.—*Proposed integrated passenger Corridor network*



May 1971. The rehabilitation program, coupled with the policy of giving passenger trains priority over freight, should reduce the scheduled times of passenger trains on most routes in the Region. Ride quality also will be enhanced by the improved track structure. USRA anticipates that most of the rehabilitation program on Amtrak routes can be completed within 5 years.

The recommended ConRail route structure generally will meet Amtrak's requirements. There are several exceptions, however. Some line segments are not recommended for inclusion in the FSP because they are not viable for freight service. These dispositions will affect the routing of Amtrak's intercity service unless alternative arrangements are made. The routes affected are:

- Portions of the Philadelphia to Harrisburg line used by Amtrak's New York to Chicago, New York to Kansas City and Philadelphia to Harrisburg services.
- The line segment from Richmond, Indiana to Indianapolis which is currently used by Amtrak's New York to Kansas City service and
- The segment from Porter, Ind. to Kalamazoo, Mich. which is part of Amtrak's Chicago-Detroit and Chicago-Port Huron services.

USRA has worked closely with Amtrak to find reasonable alternatives. In the case of the Philadelphia-Harrisburg and Porter-Kalamazoo segments, Amtrak, states or other public agencies will be offered an option to purchase or to lease the lines should the Act be amended to permit these transactions. Alternatively, the line segments could remain with the estate and Amtrak, states or other public agencies could acquire it from that entity. The Richmond-Indianapolis segment will not be used for passenger service because Amtrak is planning to reroute its New York-Kansas City trains via Dayton and Cincinnati on the Columbus-Indianapolis segment. With rehabilitated right-of-way, this diversion will not increase travel time.[2]

As a result of these arrangements. USRA believes that the needs of Amtrak's intercity rail passenger services will be met and that Amtrak's Board of Directors will approve the essential features of this arrangement.

Details of the legal property designations for intercity passenger service are found in Part II of this Report.

Commuter Services

During the several months prior to the preparation of the Final System Plan, USRA staff met with officials of the various state, local and regional transportation authorities responsible for funding and operating commuter rail services in the Region. USRA's purpose was to explain the effect of the Act and the Association's Plan on their respective services. Throughout these discussions, USRA emphasized its desire to see a smooth transition and orderly continuation of commuter service after conveyance.

Following USRA's stated policies that there should be no cross-subsidization and that the dominant user of a facility should be the owner, the Association recommended that commuter

[2]Pending rehabilitation of Cincinnati-Indianapolis, alternate routes (probably via Union City, Ind.) will be required.

authorities purchase or lease those lines over which they are the dominant user. The authorities generally indicated a willingness to acquire such properties, although in most cases a lack of available funds will preclude this possibility in time for designation in the FSP.

USRA indicated that ConRail would be available to operate commuter services, providing suitable compensation is offered. The authorities have the option of choosing a carrier other than ConRail.

A number of the commuter operations provided by railroads in reorganization are protected by a provision in the Act which requires ConRail to honor contracts which were in force at the time of passage of the Act and still effective. These include PC services in New York and Connecticut radiating from Grand Central Terminal in New York and EL services in New York and New Jersey radiating from Hoboken, N.J.

There are, however, a number of other services which, because of the nature of existing arrangements, will require new contracts prior to conveyance if present services are to be continued. In addition, there are services not under contract which will require both negotiations for a contract as well as a determination as to which agency will be responsible for such a contract. For these services, USRA recommends that ConRail negotiate with the appropriate authorities for a new operating agreement.[3] These negotiations must be completed prior to conveyance if services are to be continued.

[3]Key provisions of the model agreement proposed by USRA are that:

- ConRail ("Railroad") operate the service.
- The suburban authority pay "net avoidable cost" of providing service which represents the difference between all *revenue attributable* to the service, including fares, food, and beverage revenues, equipment rentals, concession and real-estate rentals and *expenses attributable* to the service including out-of-pocket operating expenses

(Footnote continued on next page)

Because of the technical nature of the Act and the various options available to ConRail for continuing service, the following sections list the various existing services and provide a more detailed description of the actions required by local authorities to ensure continuation of passenger operations.

Services Covered by Pre-Act Leases or Contracts

The following suburban services are operated under the terms of a pre-Act lease or contract which is still in effect today. Con-

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(Footnote continued from previous page)

(e.g., fuel, salaries and labor benefits, yard costs, equipment rentals, electric power consumed), maintenance expenses attributable to passenger service, overhead expenses attributable to passenger service, rents (other than equipment) attributable to passenger service, return on investment on additional railroad facilities required for operation of passenger service, trackage rights fees, if any, and estimated charges for freight train delay attributable to passenger service.

- Payments to be made in equal monthly installments. ConRail may, upon 30 days notice, terminate the agreement if payments are not made because of insufficient legislative appropriations.
- Payments be adjusted according to quantity and quality of service. Poor service attributable to causes beyond control of the railroad should be excused.
- The service contract run for 5-year period. It may be terminated after the first year by giving 1 year's notice.
- If service should make a profit during any complete calendar year wholly within the term of the agreement, the railroad and the authority shall agree to divide the profit between them.
- The Railroad and the authority work towards a capital improvement program to improve service and reduce costs. Improvements for sole benefit of one party shall be paid for by that party.
- A service contract cover use of all equipment dedicated to the service.
- Disputes be subject to arbitration.
- The service contract establish policy as to who shall file tariffs, collect fares, promote service, determine schedules and consists, pass policy, etc.

Rail will assume these contracts and will operate the rail commuter services listed below.

Services in this category are:

- All EL suburban services in New York and New Jersey. These services are operated under contract with the Metropolitan Transportation Authority (MTA) and New Jersey Department of Transportation (NJ DOT).
- All commuter services operated by PC radiating from Grand Central Terminal over former New York Central and New Haven lines. These services are operated under contract with MTA and the Connecticut Transportation Authority (CTA).

Although certain lines[4] necessary for the operation of these services are not required for ConRail's freight operations, an option to purchase or lease these properties for subsequent transfer to commuter authorities has been designated. In the event these options are not exercised, the properties will remain with the estates and arrangements will have to be made by ConRail or the commuter authority to gain access to these facilities.

Services Not Covered by Pre-Act Leases or Contracts

A number of commuter services are operated under the terms of a contract executed after the date of the Act or under the terms of an interim contract (e.g., a year-to-year contract in effect at the time of the Act but subsequently extended). For these commuter services, ConRail is obligated to provide only those which operate over lines acquired for freight service; it does not have to operate service on lines which are excluded. Inasmuch as the excluded properties encompass lines into the major passenger terminals or other line segments fundamental to these operations, continuation of present service patterns will require that commuter authorities

[4]Examples of such lines are the approaches and connecting tracks leading to Erie Lackawanna Hoboken Terminal and Grand Central Terminal.

acquire rights to use these facilities by lease, purchase or other arrangement from either the estates, or Amtrak, as appropriate. Such negotiations must be completed prior to conveyance if present commuter service patterns are to be maintained.

Commuter services falling into this category include:

- All RDG services in the Philadelphia area operated for the account of Southeastern Pennsylvania Transportation Authority (SEPTA).
- All PC services in the Philadelphia area operated for the account of SEPTA.
- All Pennsylvania-Reading Seashore Lines (PRSL) services operated in the Philadelphia area for the account of NJ DOT,
- All CNJ services operated in the New York-Newark area for the account of NJ DOT,
- All PC services operated in the New York-Newark area for the account of NJ DOT and
- All PC services operated between Providence and Westerly, Rhode Island for the account of Rhode Island Department of Transportation (RI DOT).

Services Not Covered by Pre-Act Leases or Contracts but Operated Over Facilities Owned by Public Agencies

In this case, the commuter authority has access to all necessary properties and there is no need to deal with the estates. It must, however, negotiate a satisfactory operating agreement with Con-Rail or a carrier of its choice for the operation of trains. Such arrangements must be completed prior to conveyance. These services, all in the Boston metropolitan area, are PC services radiating from Boston on the Boston & Albany line to Framingham, on the Shore Line to Sharon and various branches off the Shore Line. These services are operated for the account of the Massachusetts Bay Transportion Authority (MBTA).

Services Never Covered by Leases or Contracts and Operated Over Lines To Be Acquired by ConRail, Chessie or Amtrak

These services will be continued on the day of conveyance. USRA recommends that ConRail seek a satisfactory subsidy arrangement for provision of these services. If such agreements have not been executed by time of conveyance, USRA recommends that ConRail post these services for discontinuance. Approval for such discontinuances must be obtained from the proper regulatory authorities.

The services along with the recommended owner of the property after conveyance are:

- PC service between Chicago and Valparaiso, Ind. (ConRail),
- PC service between Baltimore and Washington (Amtrak),
- RDG service between Philadelphia and Newark, N.J. via Bound Brook, N.J. (ConRail),[5]
- EL service between Cleveland and Youngstown, Ohio (Chessie) and
- Services which cross jurisdictional boundaries, including:
  - —PC services operated beyond Marcus Hook, Pa. to Wilmington and Newark, Del. which lie outside the SEPTA commuter jurisdiction (Amtrak),
  - —RDG services operated beyond Pottstown to Reading and Pottsville, Pa. and beyond Quakertown to Bethlehem, Pa. which lie outside the SEPTA jurisdiction (Conrail)[6] and
  - —PC services operated beyond Sharon, Mass. to Providence, R.I. (Amtrak), and beyond Framingham to Worcester, Mass. (ConRail) which lie beyond the MBTA commuter jurisdiction.

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[5]During the discussions with Chessie for acquisition of the Reading and Erie Lackawanna properties, it became clear that as a condition of purchasing these properties, Chessie did not want to assume the obligation of negotiations with the commuter authorities. For this reason and also for the purpose of enabling SEPTA and NJ DOT to work with a single entity for the provision of commuter services, USRA recommends that ConRail assume this function by purchasing these commuter lines.

[6]See previous footnote.

Details of the legal property designations for commuter service can be found in Part II of this Report.

The Association believes that these arrangements between ConRail and the passenger entities will aid in the attainment of the goals of the Act by establishing a rail system that meets the requirements of commuter and intercity rail passenger service without impairing the ability of ConRail to be financially self-sustaining.

SECTION A

Designations to ConRail

The rail properties of railroads in reorganization or of railroads leased, operated or controlled by railroads in reorganization are designated for transfer to ConRail pursuant to section 206(c)(1)(A) in accordance with the *general designations* set forth below, subject to the *exceptions and additions* specified below:

General Designations

Rail Lines and Trackage Rights—The Rail Lines Table at the end of this section provides the details as to the designations of rail line and trackage right transfers to ConRail by each transferor. Rail line transfers are indicated in the "interest" column of the table as "line to CRC". Where "line to CRC" designations are made, all of the transferor's right, title and interest are transferred. Trackage right transfers are indicated in the "interest" column of the table as "TR to CRC". Under such designations only operating rights over the transferor's lines are transferred to ConRail with the balance of the right, title and interest transferred to others. In the other designations in this section, the transfer of some rail properties depends on an association with, or location along transferred rail lines. Such designations apply, except as specifically noted, only to transferred rail lines, and not to transferred trackage rights.

Yards—

- Transferors' interest in all freight yards associated with rail lines designated to ConRail, except for those yards offered to profitable railroads.
- Leasehold, occupancy and access rights which are necessary to the operation of present Amtrak services in all yards associated with rail lines designated to ConRail.

- An option (described in Chapter 8) to purchase or lease all or less of Transferors' remaining interest in all passenger yards associated with rail lines in which ConRail is designated an interest.

Facilities (including ore and coal wharves, intermodal terminals service and maintenance facilities such as shops, shop machinery, enginehouses, fuel stations and roadway buildings)—

- Transferors' interest in all freight facilities associated with rail lines or yards or portions thereof designated to ConRail, except for such facilities offered to profitable railroads.
- Leasehold, occupancy and access rights in all passenger related facilities necessary to the operation of present Amtrak services and associated with rail lines designated to ConRail.
- An option (described in Chapter 8) to purchase or lease all or less of Transferors' remaining interest in all passenger related facilities associated with rail lines in which ConRail is designated an interest.

Stations and Structures—

- Transferors' interest in freight related structures associated with a yard or portion thereof designated to ConRail from Transferor.
- Leasehold, occupancy and access rights necessary to the operation of present Amtrak services in stations and other passenger related structures and an option (described in Chapter 8) to acquire all or less of Transferors' remaining interest in such structures.
- Transferors' interest in those freight related structures associated with rail lines designated to ConRail which structures are used and useful in rail transportation as that term is defined in Chapter 8.
- A 2-year lease with appropriate access and occupancy rights of Transferors' interest in that portion of any structure transferred to or left with others than ConRail in which rail properties otherwise designated to ConRail are located.

Freight Cars and Nonpassenger Service Locomotives—Transferor's interest in all freight cars and nonpassenger service locomotives except for:

- such equipment under leases not meeting lease designation standards, and
- such equipment designated for offer to the Chessie.

Passenger Service Locomotives—An option (described in Chapter 8) to purchase transferors' interests in passenger service locomotives, except:

- such equipment under leases not meeting lease designation standards, and
- such equipment designated for offer to the Chessie.

Passenger Cars—An option (described in Chapter 8) to purchase transferors' interests in passenger cars except:

- such equipment under leases not meeting lease designation standards, and
- such equipment designated for offer to the Chessie.

Work equipment—Transferors' interest in work equipment except:

- that offered to Chessie, and
- such equipment under leases not meeting lease designation standards.

Roadway machinery—Transferors' interest in roadway machinery except:

- that offered to Chessie, and
- such equipment under leases not meeting lease designation standards.

Miscellaneous equipment—Transferors' interest in miscellaneous equipment except:

- such equipment under leases not meeting lease designation standards,

- that equipment offered to Chessie, and
- those vehicles related to continued administration of the transferor.

Exceptions and Additions

To the extent indicated, the designations from each of the transferors whose names appear in the part of this section which follows vary from the general designations.

The following are excepted from the rail property transfers of the listed transferors:

Yards—Transferors' interest in only portions of the following yards are designated to ConRail, as outlined in the Final System Plan Map Compendium available at the Public Information Office of the Association:

Transferor	Yard
Connecting Railway Co. . . .	Grogan Yard, Columbus, Ohio. "A" and "B" Yard, Columbus, Ohio.
Philadelphia, Baltimore & Washington R R Co.	59th Street, Chicago, Ill.
United New Jersey R R & Canal Co.	Greenville Yard, Jersey City, N.J. Harsimus Cove Yard, Jersey City, N.J.
Central R R of New Jersey.	E-Port Yard, Elizabeth, N.J.

Transferors' interest in all of the following yards are not designated to ConRail:

Transferor	Yard
Canada Southern Railway Co.	Victoria Yard, Ft. Erie, Ontario.
Penna. Tunnel & Terminal R.R. Co.....	New Lots Yard, New York, N.Y.
Philadelphia, Baltimore & Washington R.R. Co. ...	Effner Yard, Effner, Ind. "C" and "D" Yard, Columbus, Ohio.
Pittsburgh, Ft. Wayne & Chicago Railway Co.....	12th Street Yard, Chicago, Ill.
Pittsburgh, Youngstown & Ashtabula Railway Co.. .	Girard Yard, Girard, Ohio. Austenburg Yard, Austenburg, Ohio.
Penndel Company	Southport Yard, Elmira, N.Y.
Cleveland, Cincinnati, Chicago & St. Louis Railway.	Benton Harbor Yard, Benton Harbor, Mich.

The portion transferred to ConRail of any yard transferred from the Chicago River and Indiana R.R. is limited to that needed to sustain ConRail operations.

The following additional rail properties of the transferors listed are designated for transfer to ConRail.

Transferor

Canada Southern Railroad Co.

Detroit River Tunnel Co.

Niagara River Bridge Co.

Michigan Central R.R. Co.

The rail properties in Canada owned by the Canada Southern Railroad Co., the Detroit River Tunnel Co., and the Niagara River Bridge Co. which are designated in fee to ConRail are subject to the following alternative designation: If it should be determined that the transfer of properties owned and located in Canada designated in the FSP cannot be effected under the Act, then the stock and lease hold interest of PCTC and Michigan Central in the Canada Southern Railroad Co. and Detroit River Tunnel Co., the leasehold interest of the Penn Central and the stock interest of Canada Southern (if permitted by law) in Niagara River Bridge Co. are designated for transfer to Con Rail.

Both the basic and the alternative designations of these properties will not become effective if within 60 days of the effective date of the FSP, Penn Central, Michigan Central, and Canada Southern, as appropriate, enter into a binding agreement for sale of the Canadian properties which reserves to ConRail trackage rights which, in the judgment of USRA, would provide operating and capital costs for ConRail similar to those under the designation and which are otherwise in accord with the needs of ConRail.

Mahoning Coal R.R. Co.

The transferor's interest in the Lake Erie & Eastern Railroad.

Michigan Central Railroad

The transferor's stock interest in the following corporations:

Detroit Terminal Railroad

Toledo Terminal Railroad

Peoria & Eastern Railway Co.

The transferor's stock interest in the Peoria & Pekin Union Railway.

St. Lawrence and Adirondack Railway Co.

The designation of the rail properties of the St. Lawrence & Adirondack Railway Co. to ConRail is subject to the following alternative designation: If it should be determined that the transfer designated in the FSP, of assets owned and located in Canada, cannot be effected under the Act, then the leasehold and stock interests of the Penn Central in the St. Lawrence and Adirondack Railway Co. are designated for transfer to ConRail.

Indianapolis Union Railroad

The transferor's leasehold interest in the Indianapolis Belt Railroad.

Norwich & Worcester Railroad Co.

The designation to ConRail of rail properties of the Norwich & Worcester Railroad Co. is subject to the condition that, if within 60 days of the effective date of the FSP, the Norwich & Worcester provides for continuity of operations by entry into an agreement with another railroad for sale or operation of the designated properties, the designation to ConRail will not be effective.

Both the designation to ConRail and the designation to Providence & Worcester of rail properties of Norwich & Worcester Railroad Co. are subject to the condition that if within 60 days of the effective date of the FSP the Norwich & Worcester has presented to USRA a sound plan to operate the rail lines designated on and after conveyance date, which would maintain the same service coverage as the designations would provide, then these designations will not be effective.

Manor Real Estate

The transferor's interests in all rail properties in Buckeye Yard.

Philadelphia, Baltimore & Washington Railroad Co.

Transferor's interest in the stock of the following corporations:

TRRA of Saint Louis

Pittsburgh, Chartiers & Youghiogheny

An option (described in Chapter 8) to purchase Transferor's interest in the stock of Washington Terminal Co. An option to purchase Transferor's interest in a trust agreement relating to the Ivy City Yard (also known as the Joint Coach Yard in Washington, D.C.)

The Transferor's interest in the Wilmington Heavy Repair Shop adjacent to the Edgemoor Yard.

Cleveland, Cincinnatti, Chicago and St. Louis

The transferor's leasehold interest in the Central Railroad or Indianapolis.

Penn Truck Lines

The transferor's interest in all highway revenue equipment leased from Excelsior Truck Leasing Corp., subject to the lease designation standards described in Chapter 8; all franchises, licenses and other operating authorities, and an option to acquire other Penn Truck Lines interests in other equipment and other rail property; with such authorities, and option limited, however, to those used or useful in connection with operations to be conducted by ConRail.

Special exceptions and additions to designations are noted with respect to the transferors whose names appear in the following part of this section.

Transferor—Penn Central Transportation Co.

- *road properties*

Rail lines—

- There is designated for transfer to ConRail, an option to purchase Transferor's interest in the portion of USRA Line

Code No. 434 between Howe and Maronts as described in Project C&NW 434 in Table D-2 of Section G of this Appendix.

Yards—

- Transferor's interests in and rights to use the properties of Manor Real Estate in Buckeye Yard in Columbus, Ohio.
- Transferor's interest in the trust agreement relating to the Ivy City Yard (also known as the Joint Coach Yard) in Washington, D.C.
- Transferor's interest in that portion of the following yards which is outlined on yard maps in the Final System Plan Map Compendium available at the Public Information Office of the Association.

Name	Location
Weehawken	Weehawken, N.J.
60th Street	New York City, N.Y.
30th Street	New York City, N.Y.
South Boston	Boston, Mass.
Pitcairn	Pitcairn, Pa.
Stanley	Toledo, Ohio
Altoona	Altoona, Pa.
Utica	Utica, N.Y.
Cedar Hill	New Haven, Conn.
Grogan Yard	Columbus, Ohio.
Greenville	Greenville, N.J.
Harsimus Cove	Jersey City, N.J.
59th Street	Chicago, Ill.
"A"–"B"	Columbus, Ohio.

- Transferor's interests in the following yards are not designated for transfer to ConRail:

Name	Location
Dock Junction	Erie, Pa.
Buttonwood	Wilkes-Barre, Pa.
Malone	Malone, N.Y.
Newburgh	Newburgh, N.Y.
Southport	Elmira, N.Y.
New Lots	New York City, N.Y.

Name	Location
Newport	Newport, R.I.
Effner	Effner, Ind.
Victoria	Fort Erie, Ontario.
Fort	New London, Conn.
Plainfield	Plainfield, Conn.
New Kensington	New Kensington, Pa.
Girard	Girard, Ohio.
Piling	Toledo, Ohio.
C–D Yard	Columbus, Ohio.
Austinburg	Austinburg, Ohio.
W. Columbus	Columbus, Ohio.
12th Street	Chicago, Ill.
Joliet	Joliet, Ill.
Benton Harbor	Benton Harbor, Mich.
Plainville	Plainville, Conn.
Yard Avenue	Boston, Mass.
Midway	New London, Conn.
E. Boston	Boston, Mass.
Lowell	Lowell, Mass.

Marine Terminal Facilities—Transferor's interest in the marine terminal facility at Greenville Yard, Jersey City, N.J. is designated for transfer to ConRail.

Facilities (including shops, shop machinery, enginehouses, fuel stations and roadway buildings and service and maintenance facilities) not otherwise designated to Amtrak or transportation authorities.

- Transferor's interest in the engine service facility at Three Rivers, Mich. is not designated for transfer to ConRail.

- Transferor's interest in the Wilmington Heavy Repair Shop adjacent to the Edgemoor yard (which is offered to the Southern) is designated for transfer to ConRail.

Intermodal Terminals—Transferor's interest in the Port Newark intermodal terminal at Newark, N.J., is not designated for transfer to ConRail.

Rail Welding Facilities—Transferor's interest in all rail welding facilities is designated for transfer to ConRail.

Stations and other Structures not otherwise designated to Amtrak or transportation authorities—

- There is designated for transfer to ConRail such leasehold, occupancy and access rights in the Providence Union Station and the terminal agreement relating thereto as are necessary to the operation of present passenger services, and an option to purchase, lease or otherwise acquire all or less of transferor's remaining interest.

- Such leasehold, occupancy and access rights in transferor's interest in passenger stations and other structures associated with rail lines in the Northeast Corridor which are necessary to the operation of present passenger services and an option (described in Chapter 8) to purchase, lease, or otherwise acquire the remainder or less of transferor's interest.

- *equipment*

Type	Identification Number	Finance Method	Agreement Number
MU-Electric	800–805	Leased	788
MU-Electric	807–821	Leased	788
MU-Electric	850–860	Leased	788
MU-Electric	862–869	Leased	788
MU-Electric	880–889	Leased	788

Passenger Cars—There is designated for transfer to ConRail the option described in Chapter 8, to purchase the transferors' interest in all passenger cars, except:

Nonpassenger service locomotives—There is designated for transfer to ConRail an option to purchase Transferor's interest in the following locomotives which were manufactured and are operated in Canada:

Type	Identification No.
EMD GP–7	5821–5827
EMD GP–9	7432–7440

Freight cars—Transferor's interests in the following freight cars are not designated for transfer to ConRail.

Type	No. of Units	Identification Number	Finance Method	Agreement Number
Flat TOFC...	100	006700–006799	Lease	673
Flat TOFC...	100	006800–006899	Lease	672
Flat TOFC...	100	006900–006999	Lease	671
Flat TOFC...	100	009500–009599	Lease	670
Flat TOFC...	100	009600–009699	Lease	669
Flat TOFC...	050	009800–009849	Lease	666
Flat TOFC...	019	009902–009923	Lease	668
Flat TOFC...	023	009700–009799	(Unencumbered)	

Floating equipment—An option (described in Chapter 8), to purchase all or part of transferor's interest in the following floating equipment:

Type	Name or Identification Numbers	Number of Units
1960 Tug Boats.....	Cincinnati	1
1960 Tug Boats.....	New York	1
1960 Tug Boats.....	Harrisburg	1
1960 Tug Boats.....	Pittsburgh	1
1930 Car Floats	70	1
1957 Car Floats	72	1
1953 Car Floats	80–84	2
1944 Car Floats	640	1
1945 Car Floats	642–645	3
1966 Car Floats	669	1

Highway revenue equipment—

- Transferor's interest in all highway revenue equipment owned by transferor;
- Transferor's leasehold interest in highway revenue equipment leased from Excelsior Truck Leasing except such equipment under leases not meeting lease designation standards; and
- Transferor's leasehold interest in highway revenue equipment leased from Pennsylvania Truck Lines.

Transferor—Penn Central Transportation Co.—Con.

• *materials and supplies*

• Transferor's interest in materials and supplies in the stationery storehouse in Cleveland, Ohio are designated for transfer to ConRail.

• *administrative assets*

• Transferor's leasehold interest in the following buildings is designated for transfer to ConRail.

6 Penn Center Plaza, Philadelphia, Pa.
15 N. 32nd Street, Philadelphia, Pa.
31 East Georgia St., Indianapolis, Ind.

• *other*

Stock—

• Transferor's stock interest in the following corporations:

Belt Railway Co. of Chicago
Illinois Terminal Railroad
Peoria & Pekin Union Railway
Detroit Terminal Railroad
Toledo Terminal Railroad
Indiana Harbor Belt Railroad
Calumet Western Railroad
Akron & Barberton Belt Railroad
Monongahela Railway
Trailer Train Company
Fruit Growers Express Co.

• An option (described in Chapter 8) to purchase transferor's interest in the stock of the following corporations:

Lakefront Dock & Railroad Terminal Company
Richmond-Washington Co.

NOTE: The rail properties in Canada owned by the Canada Southern Railroad Company, the Detroit River Tunnel Company, and the Niagara River Bridge Company which are designated in fee to ConRail are subject to the following alternative designation: If it should be determined that the transfer of properties owned and located in Canada designated in the FSP cannot be effected under the Act, then the

stock and leasehold interest of PCTC and Michigan Central in the Canada Southern Railroad Company and Detroit River Tunnel Company, the leasehold interest of the Penn Central and the stock interest of Canada Southern (if permitted by law) in Niagara River Bridge Company are designated for transfer to ConRail. Both the basic and the alternative designations of these properties will not become effective if within 60 days of the effective date of the FSP, Penn Central, Michigan Central, and Canada Southern, as appropriate, enter into a binding agreement for sale of the Canadian properties which reserves to ConRail trackage rights which, in the judgment of USRA, would provide operating and capital costs for ConRail similar to those under the designation and which are otherwise in accord with the needs of ConRail.

- Trackage rights reserved by transferor for operating freight and passenger service over the rail properties sold to the Commonwealth of Massachusetts and MBTA.
- Trackage rights reserved by transferor for freight and passenger service under the West End Agreement with the Connecticut Transportation Authority and Metropolitan Transportation Authority.
- Trackage rights reserved by transferor for freight and passenger operations under the Hudson/Harlem lease agreement.
- All other trackage rights reserved by transferor and currently used by it in its operations over lines sold or leased by it to public authorities.
- Trackage rights in the transferor's leasehold interest in three specific line segments of the New York and Harlem Railroad Company as indicated in the Rail Lines Table.
- Transferor's leasehold interest in the following railroads: Amsterdam, Chuchtanunda and Northern Railroad, Central Railroad of Indianapolis.
- Transferor's leasehold and stock interest in the St. Lawrence & Adirondack Railway Company are designated for transfer to ConRail only if it should be determined that the

transfer of Canadian rail properties of the St. Lawrence & Adirondack Railway Company to ConRail as designated in the FSP cannot be effected under the Act.

Transferor—Reading Company

• *equipment*

There is designated for transfer to ConRail:

Nonpassenger service locomotives—Transferor's interest in the following non-passenger service locomotives:

Type	No. of Units	Identification No.	Finance Method	Finance No.
GP7	1	620	Unencumbered	
GP7	1	622	Unencumbered	
GP7	1	623	Unencumbered	
GP7	1	624	Unencumbered	
GP7	12	625–636	Unencumbered	
GP7	1	662	Unencumbered	

Freight cars—

• Transferor's interest in approximately 1,100 hopper cars currently under construction.

• *materials and supplies*

There is designated for transfer to ConRail transferor's passenger related materials and supplies in Reading, Pa.

• *administrative assets*

There is designated for transfer to ConRail transferor's interest in the Reading Terminal at Reading, Pa. with an allocation of appropriate office space to Chessie necessary for operations, subject to payment of appropriate rental to ConRail.

Transferor—Lehigh Valley Railroad

• *road properties*

Yards—

• There is designated for transfer to ConRail Transferor's interest in that portion of the following yards which is outlined on yard maps in the Final System Plan Map Compen-

dium available at the Public Information Office of the Association:

Name	Location
Jersey City	Jersey City, N.J.
Sayre	Sayre, Pa.

• No interest in the following yards is designated for transfer to ConRail:

Name	Location
Jim Thorpe	Jim Thorpe, Pa.
E. Claremont	Jersey City, N.J.
Geneva	Geneva, N.Y.
Rochester	Rochester, N.Y.
E. Buffalo	Buffalo, N.Y.
Suspension Bridge	Niagara Falls, N.Y.
Manchester	Manchester, N.Y.

Transferor—Central Railroad of New Jersey

• *road properties*

Yards—There is designated for transfer to ConRail Transferor's interest in only that portion of the following yard which is outlined on yard maps in the Final System Plan Map Compendium available at the Public Information Office of the Association:

Name	Location
E-Port	Elizabeth, N.J.

Transferor—Erie Lackawanna

• *road properties*

Yards—There is designated for transfer to ConRail Transferor's interest in the 51st St. Yard in Chicago, Ill.

• *materials and supplies*

There is designated for transfer to ConRail Transferor's interest in passenger related materials and supplies at Hoboken, N.J.

• *administrative assets*

There is designated for transfer to ConRail Transferor's interest in the Hoboken Terminal at Hoboken, N.J. with an allocation of appropriate office space to Chessie necessary for operations, subject to payment of appropriate rental to ConRail.

• *other*

Stock—Transferor's stock interest and operating agreement in Chicago & Western Indiana.

United States Railway Association

Final System Plan

December 1, 1975

Official Errata Supplement
To Volumes I and II

United States Railway Association
OFFICIAL ERRATA SUPPLEMENT
to the Final System Plan
for restructuring
Railroads in the Northeast and Midwest Region
pursuant to the
REGIONAL RAIL REORGANIZATION ACT OF 1973

DECEMBER 1, 1975

VOLUME I.—PAGES 261 THROUGH 264

Delete present pages 261-264 inclusive and substitute the following 5 pages

SECTION A

Designations to ConRail

The rail properties of railroads in reorganization or of railroads leased, operated or controlled by railroads in reorganization are designated for transfer to ConRail pursuant to section 206(c)(1)(A) in accordance with the *general designations* set forth below, subject to the *exceptions and additions* specified below:

General Designations

Rail Lines and Trackage Rights—The Rail Lines Table at the end of this section provides the details as to the designations of rail line and trackage right transfers to ConRail by each transferor. Rail line transfers are indicated in the "interest" column of the table as "line to CRC". Where "line to CRC" designations are made, all of the transferor's right, title and interest are transferred. Trackage right transfers are indicated in the "interest"-column of the table as "TR to CRC". Under such designations only operating rights over the transferror's lines are transferred to ConRail with the balance of the right, title and interest transferred to others. In the other designations in this section, the transfer of some rail properties depends on an association with, or location along transferred rail lines. Such designations apply, except as specifically noted, only to transferred rail lines, and not to transferred trackage rights. If the designation transfers an option to ConRail, that option must be exercised within 30 days after conveyance is ordered unless there is an expressly different expiration date contained in the FSP.

Yards—

- Transferors' interest in all freight yards associated with rail lines designated to ConRail, except for those yards offered to profitable railroads.
- Leasehold, occupancy and access rights which are necessary to the operation of present Amtrak services in all yards associated with rail lines designated to ConRail.
- An option (described in Chapter 8) to purchase or lease all or less of Transferor's remaining interest in all passenger yards associated with rail lines in which ConRail is designated an interest.

Facilities (including ore and coal wharves, intermodal terminals service and maintenance facilities such as shops, shop machinery, enginehouses, fuel stations and roadway buildings)—

- Transferors' interest in all freight facilities associated with rail lines or yards or portions thereof designated to ConRail, except for such facilities offered to profitable railroads.
- Leasehold, occupancy and access rights in all passenger related facilities necessary to the operation of present Amtrak services and associated with rail lines designated to ConRail.
- An option (described in Chapter 8) to purchase or lease all or less of Transferors' remaining interest in all passenger related facilities associated with rail lines in which ConRail is designated an interest.

Stations and Structures—

- Transferors' interest in freight related structures associated with a yard or portion thereof designated to ConRail from Transferor.
- Leasehold, occupancy and access rights necessary to the operation of present Amtrak services in stations and other passenger related structures and an option (described in Chapter 8) to acquire all or less of Transferors' remaining interest in such structures.

- Transferors' interest in those freight related structures associated with rail lines designated to ConRail which structures are used and useful in rail transportation as that term is defined in Chapter 8.

- A 2-year lease with appropriate access and occupancy rights of Transferors' interest in that portion of any structure transferred to or left with others than ConRail in which rail properties otherwise designated to ConRail are located.

Freight Cars and Nonpassenger Service Locomotives—Transferor's interest in all freight cars and nonpassenger service locomotives except for:

- such equipment under leases not meeting lease designation standards, and

- such equipment designated for offer to the Chessie.

Passenger Service Locomotives—An option (described in Chapter 8) to purchase transferors' interests in passenger service locomotives, except:

- such equipment under leases not meeting lease designation standards, and

- such equipment designated for offer to the Chessie.

Work equipment—Transferors' interest in work equipment except:

- that offered to Chessie, and

- such equipment under leases not meeting lease designation standards.

Roadway machinery—Transferors' interest in roadway machinery except:

- that offered to Chessie, and

- such equipment under leases not meeting lease designation standards.

Miscellaneous equipment—Transferors' interest in miscellaneous equipment except:

- Such equipment under leases not meeting lease designation standards,
- that equipment offered to Chessie, and
- those vehicles related to continued administration of the transferor.

Materials, supplies and administrative assets—Transferors' interests in materials, supplies and assets, including offices, warehouses, supplies, records, contract rights and other intangible and fiscal assets are offered and allocated as described in chapter 8.

Exceptions and Additions

To the extent indicated, the designations from each of the transferors whose names appear in the part of this section which follows vary from the general designations.

The following are excepted from the rail property transfers of the listed transferors:

Yards—Transferors' interest in only portions of the following yards are designated to ConRail, as outlined in the Final System Plan Map Compendium available at the Public Information Office of the Association:

Transferor	Yard
Connecting Railway Co. . . .	Grogan Yard, Columbus, Ohio.
	"A" and "B" Yard, Columbus, Ohio.
Philadelphia, Baltimore & Washington RR Co.	59th Street, Chicago, Ill.
United New Jersey RR & Canal Co.	Greenville Yard, Greenville, N.J.
	Harsimus Cove Yard, Jersey City, N.J.
Central RR of New Jersey .	E-Port Yard, Elizabeth, N.J.

Transferors' interest in all of the following yards are not designated to ConRail:

Transferor	Yard
Canada Southern Railway Co.	Victoria Yard, Ft. Erie, Ontario.
Penna. Tunnel & Terminal R.R. Co.	New Lots Yard, New York, N.Y.
Philadelphia Baltimore & Washington R.R. Co.	Effner Yard, Effner, Ind. "C" and "D" Yard, Columbus, Ohio.
Pittsburgh, Ft. Wayne & Chicago Railway Co.	12th Street Yard, Chicago, Ill.
Pittsburgh, Youngstown & Ashtabula Railway Co.	Girard Yard, Girard, Ohio. Austinburg Yard, Austinburg, Ohio.
Penndel Company	Southport Yard, Elmira, N.Y.

The portion transferred to ConRail of any yard transferred from the Chicago River and Indiana R.R. is limited to that needed to sustain ConRail operations.

The following additional rail properties of the transferors listed are designated for transfer to ConRail.

Transferor

Canada Southern Railroad Co.

Detroit River Tunnel Co.

Niagara River Bridge Co.

Michigan Central R.R. Co.

St. Lawrence and Adirondack Ry. Co.

The rail properties in Canada owned by the St. Lawrence and Adirondack Railway, the Canada Southern Railroad Company, the Detroit River Tunnel Company, and the Niagara River Bridge Company which are designated in fee to ConRail are sub-

ject to the following alternative designation: If it should be determined that the transfer of properties owned and located in Canada designated in the FSP cannot be effected under the Act, then the stock and leasehold interest of PCTC in the St. Lawrence and Adirondack Railway, the stock and leasehold interest of PCTC and Michigan Central in the Canada Southern Railroad Company and Detroit River Tunnel Company, the leasehold interest of Penn Central and the stock interest of Canada Southern (if permitted by law) in Niagara River Bridge Company are designated for transfer to ConRail.

Mahoning Coal R.R. Co.

The transferor's interest in the Lake Erie & Eastern Railroad.

Michigan Central Railroad.

The transferor's stock interest in the following corporations:

Detroit Terminal Railroad.

Toledo Terminal Railroad.

Indiana Harbor Belt Railroad.

Peoria & Eastern Railway Co.

The Transferor's stock interest in the Peoria & Pekin Union Railway.

Indianapolis Union Railroad

The transferor's leasehold interest in the Indianapolis Belt Railroad.

Norwich & Worcester Railroad Co.

The designation to ConRail of rail properties of the Norwich & Worcester Railroad Co. is subject to the condition that, if within 60 days of the effective date of the FSP, the Norwich & Worcester provides for continuity of operations by entry into an agreement with another railroad for sale or operation of the designated properties, the designation to ConRail will not be effective.

Both the designation to ConRail and the designation to Providence & Worcester of rail properties of the Norwich & Worcester Railroad Co. are subject to the condition that if within 60 days of the effective date of the FSP the Norwich & Worcester has presented to USRA a sound plan to operate the rail lines designated on and after conveyance date, which would maintain the same service coverage as the designations would provide, then these designations will not be effective.

Manor Real Estate

The transferor's interests in all rail properties in Buckeye Yard.

Philadelphia, Baltimore & Washington Railroad Co.

Transferor's interest in the stock of the following corporations:

TRRA of Saint Louis

Pittsburgh, Chartiers & Youghiogheny

An option (described in Chapter 8) to purchase Transferor's interest in the stock of Washington Terminal Co. An option to purchase Transferor's interest in a trust agreement relating to the Ivy City Yard (also known as the Joint Coach Yard in Washington, D.C.–

The Transferor's interest in the Wilmington Heavy Repair Shop adjacent to the Edgemoor Yard.

Cleveland, Cincinnati, Chicago and St. Louis

The transferor's leasehold interest in the Central Railroad of Indianapolis.

Pennsylvania Truck Lines

The Transferor's interest in all highway revenue equipment leased from Excelsior Truck Leasing Corp., subject to the lease designation standards described in Chapter 8; all franchises, licenses and other operating authorities, and an option to acquire other Pennsylvania Truck Lines interests in other equipment, as-

sets, rights, and properties used or useful in operations pursuant to such authorities, and option limited, however, to those used or useful in connection with operations to be conducted by ConRail.

Special exceptions and additions to designations are noted with respect to the transferors whose names appear in the following part of this section.

Transferor—Penn Central Transportation Co.

- *road properties*

Rail lines—

- There is designated for transfer to ConRail, an option to purchase Transferor's interest in the portion of USRA Line Code No. 434 between Howe and Maronts as described in Projects BN 434 and C&NW 434 in Table D-2 of Section G of this Appendix.
- There is designated for transfer to ConRail the transferor's interest in the Wrentham Branch located at Valley Falls R.I. (approximately 0.8 miles).

Yards—

- Transferor's interest in and rights to use the properties of Manor Real Estate in Buckeye Yard in Columbus, Ohio.
- Transferor's interest in the trust agreement relating to the Ivy City Yard (also known as the Joint Coach Yard) in Washington, D.C.
- Transferor's interest in that portion of the following yards which is outlined on yard maps in the Final System Plan Map Compendium available at the Public Information Office to the Association.

Name	Location
Weehawken	Weehawken, N.J.
60th Street	New York City, N.Y.
30th Street	New York City, N.Y.
South Boston	Boston, Mass.
Pitcairn	Pitcairn, Pa.
Stanley	Toledo, Ohio.

Name	Location
Piling	Toledo, Ohio.
Altoona	Altoona, Pa.
Utica	Utica, N.Y.
Cedar Hill	New Haven, Conn.
Grogan Yard	Columbus, Ohio.
Greenville	Greenville, N.J.
Harsimus Cove	Jersey City, N.J.
59th Street	Chicago, Ill.
"A"-"B"	Columbus, Ohio.

- Transferor's interests in the following yards are not designated for transfer to ConRail:

Name	Location
Dock Junction	Erie, Pa.
Buttonwood	Wilkes-Barre, Pa.
Malone	Malone, N.Y.
Newburgh	Newburgh, N.Y.
Southport	Elmira, N.Y.
New Lots	New York City, N.Y.
Newport	Newport, R.I.
Effner	Effner, Ind.
Victoria	Fort Erie, Ontario.
Fort	New London, Conn.
Plainfield	Plainfield, Conn.
New Kensington	New Kensington, Pa.
Girard	Girard, Ohio.
C-D Yard	Columbus, Ohio.
Austinburg	Austinburg, Ohio.
W. Columbus	Columbus, Ohio.
12th Street	Chicago, Ill.
Joliet	Joliet, Ill.
Plainville	Plainville, Conn.
Yard Avenue	Boston, Mass.
Midway	New London, Conn.
E. Boston	Boston, Mass.
Lowell	Lowell, Mass.

Marine Terminal Facilities—Transferor's interest in the marine terminal facility at Greenville Yard, Jersey City, N.J. is designated for transfer to ConRail.

Facilities (including shops, shop machinery, enginehouses, fuel stations and roadway buildings and service and maintenance facilities) not otherwise designated to Amtrak or transportation authorities.

- Transferor's interest in the engine service facility at Three Rivers, Mich. is not designated for transfer to ConRail.
- Transferor's interest in the Wilmington Heavy Repair Shop adjacent to the Edgemoor yard (which is offered to the Southern) is designated for transfer to ConRail.

Intermodal Terminals—Transferor's interest in the Port Newark intermodal terminal at Newark, N.J., is not designated for transfer to ConRail.

Rail Welding Facilities—Transferor's interest in all rail welding facilities is designated for transfer to ConRail.

Stations and other Structures not otherwise designated to Amtrak or transportation authorities—

- There is designated for transfer to ConRail such leasehold, occupancy and access rights in the Providence Union Station and the terminal agreement relating thereto as are necessary to the operation of present passenger services, and an option to purchase, lease or otherwise acquire all or less of transferor's remaining interest.
- Such leasehold, occupancy and access rights in transferor's interest in passenger stations and other structures associated with rail lines in the Northeast Corridor which are necessary to the operation of present passenger services and an option (described in Chapter 8) to purchase, lease, or otherwise acquire the remainder or less of transferor's interest.

Nonpassenger service locomotives—There is designated for transfer to ConRail an option to purchase Transferor's interest in the following locomotives which were manufactured and are operated in Canada:

Type	Identification No.
EMD GP-7	5821-5827
EMD GP-9	7432-7440

Freight cars—Transferor's interest in the following freight cars are not designated for transfer to ConRail:

Type	No. of units	Identification Number	Finance Method	Agreement Number
Flat TOFC .	100	006700–006799	Lease	673
Flat TOFC .	100	006800–006899	Lease	672
Flat TOFC .	100	006900–006999	Lease	671
Flat TOFC .	100	009500–009599	Lease	670
Flat TOFC .	100	009600–009699	Lease	669
Flat TOFC .	050	009800–009849	Lease	666
Flat TOFC .	019	009902–009923	Lease	668
Flat TOFC .	023	009700–009799	(Unencumbered)	

Floating equipment—An option (described in Chapter 8), to purchase all or part of transferor's interest in the following floating equipment:

Type	Name or Identification Number	Number of units
1960 Tug Boats.....	Cincinnati	1
1960 Tug Boats.....	New York	1
1960 Tug Boats.....	Harrisburg	1
1960 Tug Boats.....	Pittsburgh	1
1930 Car Floats	70	1
1957 Car Floats	72	1
1953 Car Floats	80–84	2
1944 Car Floats	640	1
1945 Car Floats	642–645	3
1966 Car Floats	669	1

Highway revenue equipment—

- Transferor's interest in all highway revenue equipment owned by transferor;
- Transferor's leasehold interest in highway revenue equipment leased from Excelsior Truck Leasing except such equipment under leases not meeting lease designation standards; and
- Transferor's leasehold interest in highway revenue equipment leased from Pennsylvania Truck Lines.

- *materials and supplies*
  - Transferor's interest in materials and supplies in the stationery storehouse in Cleveland, Ohio are designated for transfer to ConRail.
- *administrative assets*
  - Transferor's leasehold interest in the following buildings is designated for transfer to ConRail.

    6 Penn Center Plaza, Philadelphia, Pa.

    15 N. 32nd Street, Philadelphia, Pa.

    31 East Georgia St., Indianapolis, Ind.

- *other*

  Stock—

  - Transferor's stock interest in the following corporations:

    Belt Railway Co. of Chicago
    Illinois Terminal Railroad
    Peoria & Pekin Union Railway
    Detroit Terminal Railroad
    Toledo Terminal Railroad
    Indiana Harbor Belt Railroad
    Calumet Western Railroad
    Akron & Barberton Belt Railroad
    Monongahela Railway
    Trailer Train Company
    Fruit Growers Express Co.
    Niagara Junction Railway
    Merchants Despatch Transportation Company

  - An option (described in Chapter 8) to purchase transferor's interest in the stock of the following corporations:

    Lakefront Dock & Railroad Terminal Company
    Richmond-Washington Co.

NOTE: The rail properties in Canada owned by the St. Lawrence and Adirondack Railway, the Canada Southern Railroad Company, the Detroit River Tunnel Company, and the Niagara River Bridge Company which are designated in fee to ConRail are subject to the following alternative designation: If it should be determined that the transfer of properties owned and located in Canada designated in the FSP cannot be effected under the Act, then the stock and leasehold interest of PCTC in the St. Lawrence and Adirondack Railway, the stock and leasehold interest of PCTC and Michigan Central in the Canada Southern Railroad Company and Detroit River Tunnel Company, the leasehold interest of Penn Central and the stock interest of Canada Southern (if permitted by law) in Niagara River Bridge Company are designated for transfer to ConRail. Both the basic and the alternative designations of these properties will not become effective if within 60 days of the effective date of the FSP, Penn Central, Michigan Central, Canada Southern and St. Lawrence and Adirondack Ry. Co. as appropriate, enter into binding agreements, for sale of the Canadian properties which reserves to ConRail trackage rights which, in the judgment of USRA, would provide operating and capital costs for ConRail similar to those under the designation and which are otherwise in accord with the needs of ConRail.

- An option, to be exercised by April 15, 1976, to purchase the portion of the Oil City Secondary Track (USRA Line No. 647) between Red Bank (Brady Milepost 64.6) and Emlenton, Pa. (Milepost 88.9) if necessary to serve shippers in the Oil City area if Chessie does not agree to serve these shippers on terms acceptable to ConRail.

- Trackage rights reserved by transferor for operating freight and passenger service over the rail properties sold to the Commonwealth of Massachusetts and MBTA.

- Trackage rights reserved by transferor for freight and passenger service under the West End Agreement with the Connecticut Transportation Authority and Metropolitan Transportation Authority.

- Trackage rights reserved by transferor for freight and passenger operations under the Hudson/Harlem lease agreement and an operating easement in all properties used exclusively for freight service on lines covered by the agreement.

- All other trackage rights reserved by transferor and currently used by it in its operations over lines sold or leased by it to public authorities.

- Trackage rights in the transferor's leasehold interest in three specific line segments of the New York and Harlem Railroad Company as indicated in the Rail Lines Table.

- Transferor's leasehold interest in the following railroads:

  Amsterdam, Chuchtanunda and Northern Railroad, Central Railroad of Indianapolis.

Transferor United N.J. R.R. & Canal Company

- *road properties*

  There is hereby designated for transfer to ConRail an option to acquire transferor's interest in the Belvidere Branch from Trenton Fair (Milepost 1.4) to Phillipsburg (Milepost 34.4) if USRA determines within 60 days of the effective date of the FSP that alternative arrangements for moving overhead traffic between Trenton, N.J. and Phillipsburg, N.J. cannot be arranged.

Transferor—Erie and Kalamazoo Railroad

- *road properties*

  There is designated for transfer to ConRail Line Code segment 3635-Ottowa Lake to Riga, Milepost 310.0 to 315.5 (Vulcun Old Rd. Branch) if USRA determines within 60 days after the effective date of the FSP that this line segment must be included in ConRail to serve Clinton, Mich.

Transferor—Reading Company

- *equipment*

  There is designated for transfer to ConRail:

  - Transferor's interest in approximately 1,100 hopper cars and 300 gondola cars presently under construction, provided that if Chessie System accepts the offer of the Reading properties pursuant to the FSP, ConRail shall sublease to Chessie System on a direct pass through basis the 300 gondola cars if Chessie requests those 300 cars by January 15, 1976.

- *materials and supplies*

  There is designated for transfer to ConRail transferor's passenger related materials and supplies.

- *administrative assets*

  There is designated for transfer to ConRail a leasehold interest of not to exceed 2 years in the offices in the Reading Terminal, Philadelphia, Pa., for use during the transition period until suitable permanent arrangements for the railroad personnel can be made. Reasonable rental shall be paid based on the present cost of comparable commercial property. ConRail shall sublease to Chessie on the same terms and conditions for the temporary occupancy of Chessie personnel.

- *Other*

  50 percent of the Transferor's interests in the Philadelphia, Reading, and Pottsville Telegraph Company.

Transferor—Lehigh Valley Railroad

- *road properties*

  Yards—

  - There is designated for transfer to ConRail Transferor's interest in that portion of the following yard which is

outlined on yard maps in the Final System Plan Mas Compendium available at the Public Information Office of the Association:

Sayre	Sayre, Pa.

- No interest in the following yards is designated for transfer to ConRail:

Name	Location
Jim Thorpe	Jim Thorpe, Pa.
E. Claremont	Jersey City, N.J.
Geneva	Geneva, N.Y.
Rochester	Rochester, N.Y.
E. Buffalo	Buffalo, N.Y.
Suspension Bridge	Niagara Falls, N.Y.
Manchester	Manchester, N.Y.

Stock—

- Transferor's stock interest in the Niagara Junction Railway and the Buffalo Creek Railway.

Transferor—Central Railroad of New Jersey

- *road properties*

Yards—There is designated for transfer to ConRail Transferor's interest in only that portion of the following yard which is outlined on yard maps in the Final System Plan Map Compendium available at the Public Information Office of the Association:

Name	Location
E-Port	Elizabeth, N.J.
Jersey City	Jersey City, N.J.

Transferor—Erie Lackawanna

- *road properties*

Yards—

- There is designated for transfer to ConRail Transferor's interest in the 51st St. Yard in Chicago, Ill.

No interest in the following yard is designated for transfer to ConRail:

Name	Location
Marion Yard	Marion, Ohio

- There is designated for transfer to ConRail an option to be exercised by April 16, 1976 to acquire overhead trackage rights over that portion of the Erie Lackawanna Railroad between Reno, Pa. (Milepost 28.46) and the connection with the former Pennsylvania RR at Oil City, Pa. (app. Milepost 33.9) if Chessie does not agree to serve shippers located on ConRail lines in the Oil City area on terms acceptable to ConRail.

- *materials and supplies*

  There is designated for transfer to ConRail Transferor's interest in passenger related material and supplies except for those in Ohio.

- *administrative assets*

  There is designated for transfer to ConRail Transferor's interest in the Hoboken Terminal at Hoboken, N.J. with an allocation of appropriate office space to Chessie necessary for operations, subject to payment of appropriate rental to ConRail.

- *other*

  Stock—

  - Transferor's stock interest and operating agreement in Chicago & Western Indiana.
  - Transferor's stock interest in the Chicago Belt Railway.

Temporary Interests in Rail Lines

There is designated for transfer to ConRail, for a period not to exceed 1 year or such lesser period as is necessary to construct connections contemplated by this plan, overhead trackage rights in the "available for subsidy" rail lines of the listed transferors.

The listed rail lines are not designated for transfer to ConRail for the purpose of providing local rail service and will remain available for subsidy for such local operations during the use of the lines by ConRail for overhead operations.

Line Code	MP From	MP To	From	To	Name
Penn Central Transportation Company					
1302	90.5	94.5	Royalton, PA	Conewago, PA	Phil.-Pitt. Main Line
New York and Harlem Railroad					
9131	81.6	125.0	Wassaic, NY	Chatham, NY	Harlem Line
4131	125.0	126.3	Chatham, NY	Chatham, NY	Harlem Line
Penndel Company					
4835	3.1	.9	Scottsville Yard, NY	Rochester, NY	Rochester Sec.
5338	159.6	171.9	Waspi, MI	Vicksburg, MI	GR&I
Lehigh Valley Railroad					
0603A	438.0	411.0	Niagara Jct., NY	Batavia, NY	Main Line
Philadelphia, Baltimore and Washington RR.					
8206	158.0	126.0	Charlottesville, IN	Centerville, IN	Main Line

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

CONSOLIDATED RAIL CORPORATION, NATIONAL RAILROAD PASSENGER CORPORATION, *Plaintiffs,* v. METRO-NORTH COMMUTER RAILROAD COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY, and CONNECTICUT DEPARTMENT OF TRANSPORTATION, *Defendants,* v. UNITED STATES OF AMERICA, *Counterclaim Defendant.*	General Panel C.A. No. 83-14

Memorandum-Order Denying Motion to Enjoin the Interstate Commerce Commission from Taking Further Action in Finance Docket No. 30426

This memorandum deals with so much of defendants' motion dated May 14, 1984, as asks us to enjoin the Interstate Commerce Commission (the ICC or the Commission) from taking further action in Finance Docket No. 30426 pending final disposition of this action. In that docket National Railroad Passenger Service Corporation (the Corporation or Amtrak) applied under 45 U.S.C. § 562(a) to have the Commission fix just and reasonable compensation for the use of certain tracks and facilities of defendants Metro-North and MTA constituting a part of what had been the Penn Central's Harlem-Hudson Division. These tracks and facilities extend from Grand Central Terminal in New York City to Poughkeepsie, New York. Amtrak desires to use them for

its passenger service from New York City to Albany, and thence over what had been the New York Central's "water-level" route to Chicago. We granted the Commission leave to intervene in this action for the limited purpose of responding to the request for an injunction. MTA, apparently the only defendant having a stake in the motion, has submitted a reply memorandum.

The statute, 45 U.S.C. § 562(a), invoked by the Corporation provides in pertinent part:

> The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree, which terms shall include a penalty for untimely performance. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad or agency under such order or under an order issued under subsection (b) of this section shall be conditioned upon payment by the Corporation of the compensation fixed by the Commission.

"Regional transportation agency" is defined in 45 U.S.C. § 502(15) to mean "an authority, corporation, or other entity established for the purpose of providing passenger service within a region." On its face the language of the statute would seem to cover Amtrak's application in F.D. No. 30426. The motion for an injunction is based on a number of grounds. It asserts (1) that the defendants are not "regional transportation agencies"; (2) that the quoted provision in 45 U.S.C. § 562(a) is limited to railroads that have freed themselves from the burden of passenger service by making a contract for Amtrak to provide it under 45 U.S.C.

§ 561; (3) that under the circumstances of this case this court has exclusive jurisdiction to fix compensation for any trackage rights that Amtrak requires with respect to the Harlem-Hudson Division; and (4) that administrative determination of the compensation payable for trackage rights is unconstitutional.

We do not find it necessary or desirable at the present time to engage in detailed discussion of these arguments. The burden on an applicant asking a court to stay an administrative proceeding because of alleged lack of jurisdiction on the part of the agency is heavy, although as Professor Kenneth Culp Davis has long and cogently argued, language in the much-cited case of *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), is too extreme and has not in fact been followed, 3 Administrative Law Treatise § 20.02, at 57-67 (1958); 4 Administrative Law Treatise § 26.4, at 425-431 (2d ed. 1983). Professor Davis proposes, and we adopt, a three factor test supported by decisions of the Ninth and Sixth Circuits, *id.* § 26.5, at 432-34. This is:

> [T]hat to determine whether ~~or not~~ a court should decide a question of administrative jurisdiction without requiring exhaustion of administrative remedies, a court should consider three factors—extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction.

The first two grounds asserted by MTA do not pass the test of this standard. With respect to these, the extent of the injury from the pursuit of the administrative remedy and the degree of apparent doubt about administrative jurisdiction are small, and the benefit of obtaining the agency's interpretation of the statute is great. With respect to the fourth ground, which as Professor Davis recognizes, may stand somewhat differently because of an agency's lack of power to pass upon the constitutionality of a statute, 4 Administrative Law Treatise § 26.6, at 434 (2d ed.), the question does not appear to us to be substantial in light of *Thomp-*

son v. Texas Mexican Railway Co., 328 U.S. 134, 147-148 (1946), and in any event MTA can raise the question in a review of whatever order the Commission may make in F.D. No. 30426. The third ground is an attempt to distill from § 504(f) of the Rail Passenger Service Act as amended by the Northeast Rail Service Act of 1981 (NRSA), Pub. L. 97-35, 95 Stat. 643, 649 (1981), a principle not within its terms, and then to join this with the exclusive jurisdiction provision of § 1152(a) (1) of NRSA and our statement in *Consolidated Rail Corporation v. Pittsburgh and Lake Erie Railroad Company*, 459 F. Supp. 1013, 1018-19 (1978), that, despite the limitation of § 209(g) of the Rail Act to stays of court proceedings, we nevertheless had power under the all writs statute, 28 U.S.C. § 1651, to stay or enjoin an administrative proceeding that threatened our own jurisdiction. *Consolidated Rail Corporation v. Delaware and Hudson Ry.*, 543 F. Supp. 1079 (1982), where we declined to stay a Commission proceeding for the fixing of conditions and compensation under reciprocal switching agreements, appears to be a closer, although admittedly not a perfect, analogy. In the *P&LE* case our jurisdiction to decide the controversy was clear; here while we undoubtedly have jurisdiction to interpret NRSA, it is far from plain that such interpretation would have the result for which MTA contends. In any event our invocation of the all writs statute is discretionary. Whether the provision in § 1152(a)(1) of NRSA giving this court,

> original and exclusive jurisdiction over any civil action—
>
> > (1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation, of any provision of or amendment made by this subtitle, *or administrative action taken thereunder to the extent such action is subject to judicial review*[1] (emphasis supplied),

[1]The underscored provision has no counterpart in § 209(e)(1) of the Rail Act.

gives this court exclusive jurisdiction to review any order made by the ICC in F.D. No. 30426, is another question, which can be determined when it arises.

As a final point MTA argues that nothing would be lost by staying F.D. No. 30426 since MTA is not interfering with the Amtrak operation there at issue and is willing to forego receipt of whatever moneys the Commission may award until the issues in this action are resolved. However, we are not authorized to stay an administrative proceeding simply because no apparent harm would result. We must therefore decline to enjoin the Commission proceeding, although we would welcome an agreement between Amtrak and MTA to defer it, with the Commission's approval, on whatever conditions they can work out.

The motion for an injunction is denied.

HENRY J. FRIENDLY, Presiding Judge

JOHN MINOR WISDOM, Judge

ROSZEL C. THOMSEN, Judge

Verified Statement of
T. Stephen O'Connor

My name is T. Stephen O'Connor. I am a partner in the firm of Kenny, O'Connor and Associates, a transportation consulting firm located in Ann Arbor, Michigan.

I have over ten years experience in transportation economics including financial analysis, costing, economic forecasting, operations analysis, litigation support and contract negotiations. A more detailed statement of the firms qualifications, as well as my resume, is found in Exhibit A hereto.

This statement is made at the request of the Metropolitan Transportation Authority ("MTA") and Metro-North Commuter Railroad Company ("Metro-North"). In 1983, under contract to Metro-North, I provided services to Metro-North in connection with its assumption of commuter rail operation over rail lines known as the Hudson, Harlem and New Haven, into and out of Grand Central Terminal. My 1983 assignment involved among other things an in depth analysis of Metro-North's operations in order to ensure that costs associated with operating the commuter services were captured and assigned to the appropriate Cost Centers. As part of that assignment I also analyzed the costs associated with Amtrak's operation between Grand Central Terminal and Poughkeepsie, New York ("the Hudson Line"). Consequently, I am thoroughly familiar with Metro-North's and Amtrak's operation on the Hudson Line and the costs associated therewith.

In preparation of this statement I have reviewed the most recent Metro-North data available concerning Hudson Line operations and costs for Metro-North, Amtrak and Conrail between Poughkeepsie and Grand Central Terminal. For the reasons set forth herein I have determined that costs for the operation of the Hudson Line should be shared on a fully distributed basis, including depreciation and a return on investment.

The main purpose of this testimony is to set forth a recommended costing methodology which meets industry-wide standards of "just and reasonable" compensation under a trackage rights or terminal sharing arrangement.

In its submission in Finance Docket 30426 Amtrak proposed the use of avoidable costing as the appropriate methodology to determine the compensation due Metro-North for Amtrak's use of the Hudson Line and Grand Central Terminal (GCT).

For the reasons set forth herein I have rejected the use of such a methodology. My comments on the appropriate costing methodology do not involve the legal issues pertaining to the appropriateness of using one methodology over another. For that I refer the reader to counsel's brief which accompanies this statement.

The first section of this statement provides a description of the facilities and operation of the Hudson Line and GCT. The second section discusses cost finding principles from which a costing methodology consistent with "just and reasonable" concepts have been developed. The third section presents the application of a fully distributed methodology to the operation and use patterns of the Hudson Line and Grand Central Terminal using data provided by Metro-North. The fourth and final section briefly critiques Amtrak's presentation to the Commission.

I. THE HUDSON LINE OPERATION

To appreciate the expenses associated with operating the Hudson Line and Grand Central Terminal the Commission should have an understanding of the physical plant.

The Hudson Line is leased by the Metropolitan Transportation Authority from the Penn Central Corporation. The lease is a long term one with 87 years remaining. Metro-North is a subsidiary of MTA and operates commuter rail service on behalf of MTA.

Henceforth, MTA and Metro-North will be referred to jointly as Metro-North.

The Hudson line begins at Grand Central Terminal, proceeds northward via the Park Avenue Tunnel and Viaduct and crosses the Harlem River to "MO" interlocking in the Bronx. At "MO" the Harlem line diverges and the Hudson line continues along the shore of the Harlem River until the Harlem converges with the Hudson River. At this point, the railroad again turns northward and follows the Hudson river to the end of the Metro-North territory in Poughkeepsie—73 miles from Grand Central Terminal. In total there are 75.8 route miles, 219.9 track miles, 131.3 miles of third rail and 30 stations on the Hudson Line and another 2.5 miles of Metro-North railroad after Poughkeepsie which only Amtrak and ConRail operate over. The rail line continues beyond Poughkeepsie as ConRail's Northeastern Region to Albany, Syracuse, Buffalo, and points west.

Between Poughkeepsie and Croton-Harmon, over half the distance of the Hudson Line (40.2 miles), Amtrak operates 18 trains a day and Metro-North operates 30 trains on the average weekday.[1] The number of Metro-North trains increases eastward over each major segment with 95 trains operating on an average weekday between Spuyten Duyvil and Mott Haven.

Mott Haven ("MO") is the junction for the Hudson, Harlem and New Haven lines. All three rail lines converge at Mott Haven and run into Grand Central Terminal. Some 421 scheduled Metro North commuter trains operate over the line from Mott Haven to Grand Central Terminal, a total distance of 5.4 miles, each weekday.

[1]Unless otherwise noted trains per day and average trains per day refers to typical weekday operations. Naturally, Metro-North runs substantially fewer trains on the weekends and holidays, 356 average trains per day when weekends are considered.

The Hudson Line has four tracks with signals for bi-directional operations from Tower "U" at 59th Street under Park Avenue to "MO" interlocking a distance of approximately 4.5 miles. There are 3 tracks between "MO" and "DV" interlocking at Spuyten Duyvil, with the exception of a short, two-track section through a rock cut, and four tracks from "DV" to "CD" interlocking, just north of Croton-Harmon Station, 34 miles from Grand Central Terminal. It is here that the electrified portion of the Hudson Line ends; service beyond is provided by diesel-powered equipment. Three tracks extend from "CD" (Mile Post 34.6) to CP 40 (Mile Post 40.8), just south of Peekskill Station, while two tracks cover the remaining distance to Poughkeepsie (40.2 miles). CP 40 is one of the "controlled points" on the railroad where the switches and signals are under the control of the train dispatcher in New York City. Cab signals, which provide continuous indication of signal status in the engine control cab, are in service between "CD" and Poughkeepsie.

Traction power for the electrified Hudson service is purchased from the New York State Power Authority and Con Edison. It is converted to 600 volt D.C. power in the railroad's substations and transmitted to the trains via an underrunning 3rd rail (the current collectors or "shoes" on the self-propelled cars and FL-9 engines and Amtrak Turboliners run under the rail).

All Metro-North rail lines run underground as of 96th Street in Manhattan. Grand Central Terminal begins at 59th Street and ends at 42nd Street approximately 0.9 miles. It has three signal towers which control the movement over approximately thirty-four miles of track that lie within two levels of the terminal. Grand Central Terminal has 123 tracks, 66 on the upper level and 57 on the lower level. There are 31 platform tracks on the upper level and 17 on the lower level. Train movements are controlled by 356 switches and 516 signal lights. It is clear that Grand Central Terminal is a massive and complex terminal which is inherently

expensive to operate. Further, the tunnel leading to Grand Central Terminal as well as Grand Central Terminal itself are about to undergo major capital improvements.

As far as commuter service is concerned, electric train service is operated with M-1, M-3 and 1100 series multiple-unit cars. Peak period service operates at approximately 25 minute headways. Off-peak, local trains to Croton-Harmon and express trains with connections to Poughkeepsie operate hourly. Diesel service on the Upper Hudson, beyond the electrified zone, operate approximately half-hourly during the peak periods with three trains running through to Grand Central Terminal in each direction. The predominant service in this area is comprised of diesel shuttle trains connecting at Croton-Harmon with electric trains.

Train operations on the Hudson Line are controlled by two types of signal systems: Automatic Block Signals (ABS) and Traffic Control System (TCS). Under the ABS in effect between "DV" and "CD", tracks are signaled for one direction and following trains are governed by signal indications. If a train must operate in the nonsignalled direction, or "against the current of traffic", the signals controlling entrance to the track must be blocked, train orders issued, and only one train may occupy the track between two signal towers or interlockings at a time. An interlocking is a set of interconnected signals and other appliances, usually switches, that must be operated in a pre-determined sequence (interlocked) so that clear signals cannot be simultaneously established for conflicting routes. With the TCS in effect on the remainder of the line, tracks are signaled in both directions and train movements in both directions are authorized by block signals.

The following presents the major facilities on the Hudson Line and Grand Central Terminal:

Mile Post	
0.4	Towers "A", "B" and "C" on Grand Central Terminal's upper and lower levels route trains to platform tracks.

Mile Post	
0.7	Tower "U" under 59th Street routes trains from the 4 tracks in the Park Avenue Tunnel to the Grand Central Terminal complex.
3.2	"NICK" interlocking is near the mouth of the Park Avenue Tunnel.
4.6	"BRIDGE" (Harlem River lift bridge).
5.4	"MO" interlocking is the railroad's major interlocking and junction with the Harlem line located at Mott Haven in the Bronx.
9.9	"FH" interlocking is the beginning of the 2 track rock cut near Marble Hill Station.
11.2	"DV" interlocking is the junction with the former freight track to the west side of Manhattan just north of Spuytan Duyvil Station.
16.3	"GD" interlocking at Glenwood Station is remotely controlled from "DV".
24.7	"OW" interlocking. South of Tarrytown Station.
32.9	"CR" interlocking controls routing at southern end of Harmon terminal complex and is remotely controlled from HM Tower.
33.4	"HM" interlocking controls train routing for Harmon yard and shop and Croton-Harmon station, the major connecting point between diesel and electric service. Harmon Shop is the railroad's primary car and locomotive maintenance repair and overhaul facility.
34.6	"CD" interlocking controls routing at the north end of the Harmon terminal complex.
40.8	Located south of Peekskill, CP-40 is the beginning of 2 track territory; all Upper Hudson CPs are controlled from the Train Dispatcher's office in New York.
48.2	CP-48. South of Garrison.
58.6	CP-58. South of Beacon.

Mile Post	
61.4	CP-61. North of Beacon.
72.5	CP-72. South of Poughkeepsie.
73.6	Poughkeepsie station.
75.5	CP-75.
75.8	End of Metro-North; beginning of ConRail's Northeast Region.

II. COSTING METHODOLOGIES

Several methodologies have been used by railroads in negotiating compensation in trackage rights and terminal sharing agreements, as well as by the Interstate Commerce Commission (ICC) as cost standards in basic trackage rights and terminal sharing disputes.

The primary costing methodologies or theories[2] that will be described in this document are:

—*Avoidable*
—*Fully Allocated*

In determining the assignment of trackage rights compensation, *all* economic costs must be considered[3] including the cost of capital. Capital costs comprise depreciation and the return which the owner may expect on his investment in the line and facilities. Only when all costs are considered is it possible to assign trackage rights fees which allow:

—Metro-North just compensation for use of its assets
—Amtrak a just and reasonable tenant fee.

[2]"Avoidable" and "fully allocated" are used here to describe general theories of methodologies and not intended to represent *RSPO Avoidable* and *ICC Prescribed Fully Allocated*.

[3]*See*, Comments of National Railroad Passenger Corporation in Ex Parte No. 417 and Ex Parte No. 417 (Sub. No. 1) dated October 9, 1981; testimony of George H. Borts, hereafter referred to as "Amtrak Ex Parte 417".

Before discussing the methodology, it will be beneficial to define the costs by components:

- Solely related costs
- Directly attributable costs
- Common costs
- Depreciation
- Return on capital

Solely Related Costs are those costs that can be demonstrated to have been caused by a given activity and reflect the cost of an operation or facility which is used exclusively by one service. For example, the cost of operating and maintaining a passenger station at Tarrytown, N.Y. which serves only Metro-North commuters may be readily identified as having been entirely caused by the operation of commuter service on the Hudson Line. Under any costing methodology these costs should be borne solely by Metro-North.

Directly Attributable Costs are also costs which are readily assignable and directly attributable, though not necessarily solely related to one party. For example, a track gang assigned to maintain New Haven yard "lead" tracks will be working on physical plant for both Metro-North and Amtrak. However, the gang's wages may be readily shown to have been caused by each particular service based on the number of hours worked on each party's track segments. Therefore, even though the cost of this track gang is not solely related to either service, they are directly assignable to each of the particular services for which the work was performed.

Common Costs are those costs which result from collective activities and which cannot be readily traced to or shown to be caused by a particular activity or group of activities. For example, it is relatively simple to determine track maintenance costs from Mott Haven to Grand Central Terminal. However, to determine whether Metro-North or Amtrak caused the costs to be incurred

is an extremely complex analysis. As another example, the cost of General and Administrative Functions can be readily determined, but the assignment of those costs to the individual user is not easily accomplished.

Common costs can be broken into two sub-components—fixed and variable. It is this mixed nature of common costs and the problem in precisely identifying the magnitude of each sub-component which causes the greatest difficulty in cost assessment and assignment. To illustrate the complexity of the issue, a 39 foot length of rail will deteriorate over time regardless of usage. This deterioration is a fixed cost. In addition, the operation of trains over this rail will cause further wear.

The fixed portion of common costs will be experienced if there is any service provided at all and, by definition, should not vary significantly with the level of service operated. These costs cannot be apportioned among the users and services performed on an avoidable cost or cost causative basis. The variable portion of common costs vary directly with the volume of service produced and could be related to a common causative factor. Factors can be developed or special studies performed to relate the amount of usage by each service to the cost variability by type of use.

Capital Costs include depreciation expense and the cost of capital. They can be solely related, directly attributable or common costs.

Depreciation expense is the reduction in value of an asset resulting from its use, based upon an assumed useful life. For example, if a public agency such as the MTA purchases a building for $300,000 and the building has an estimated useful life of 30 years, one method of depreciation is to assign $10,000 as the depreciation expense each year for 30 years.

The cost of capital is in the instant case, the cost of money. An agency such as the MTA borrows in the debt market to finance its

assets and must pay interest at competitive rates, currently 11%. The interest payments are part of the cost of obtaining the assets.

Cash flows from capital investments must be sufficient to meet interest or indebtedness, and in addition to accumulate a cash reserve equal to the cost of maintaining the investment as it wears out.

The above cost components are the logical "building blocks" for analyzing the primary costing methodologies.

AVOIDABLE COSTS

It logically follows that any one user's total avoidable costs are the sum of its solely related costs, directly attributable costs and variable portion of common costs.[4] A review of all the cost elements is made to determine which would not be incurred if that particular user's activity were eliminated.

As a starting point for an avoidable cost analysis, the service to the tenant must be viewed as the avoidable service. Solely related and directly attributable costs can be determined through a tabulation of facilities and manpower associated with the operation of the service and identification of assets by cost category. This process is completed through the development of cost accumulation systems yielding identification of cost causality.

However, a more important and complex issue is the determination of common cost avoidability on a long-term versus short-term basis. Short-term avoidable costs approximate out-of-pocket costs, that is the expense to be saved if user traffic were discontinued over the line of the lessor, for example over a three months. A long-term avoidable cost approach recognizes elimination of

[4]Amtrak has several "basic" agreements with freight railroads where they do not contribute to variable common costs. In this proceeding, Amtrak has promulgated an avoidable cost methodology in which they do not contribute to all variable common costs.

certain fixed common costs as well as short-term avoidable costs. For instance, Metro-North management anticipates a specified use level of the Hudson Line from Peekskill to Poughkeepsie, which includes Amtrak's 37% of usage, in making its capital improvement plans. Clearly the plans would be different if the traffic over this segment were reduced by 37%. However, in developing its capital plans management does not formulate alternative plans to consider what it would do *sans* 37% of a line segments usage. Simply put, the failure of any costing methodology to account for long term avoidable costs renders such methodology useless and devoid of reality.

Historically, railroad industry trackage rights agreements dealt with both long and short-term variable costs. Short-term avoidable costs are most appropriate in incremental or short-term contract situations, (e.g. a "special move" or seasonal traffic). Long-term costs are more appropriate in long-term service applications, including short-term contracts if the intent of the contract is periodic renewal.

Long-term avoidable cost is generally the preferred basis of identifying the full range of costs to be shared and leads one to the conclusion that the fully allocated basis of determining trackage rights the appropriate method to determine compensation.[5]

FULLY ALLOCATED COSTS

A fully allocated costing methodology includes the solely related and directly attributable costs described under the avoidable methodology but also provides for capital costs and a usage-based share allocation of fully distributed common costs which are in-

[5]Amtrak proposes this approach as the preferred basis in its submission to the Commission on Ex Parte No. 417. In Ex Parte 417 Amtrak also argues that this is the preferred basis in the industry of formulating trackage rights compensation. Amtrak's position in this proceeding indicates that its belief in costing methodology depends upon whose ox is being gored.

curred in maintaining, operating, repairing, rehabilitating and renewing the rail lines and facilities.[6]

This methodology takes account of the 'base' costs of rail lines and facilities inclusive of both fixed and variable common costs which are incurred for the benefit of both users.[7] For example, if two users operate on a rail line it may require that there be four tracks rather than two or three. Therefore, the total costs directly and indirectly[8] associated with these four tracks would be described as common or base costs and should be shared between the two users. Solely related and directly attributable costs would not be included in the 'base' common costs.

The costs that are determined to be direct 'base' common costs of the operation (e.g. track, communications and signals, towers etc.) are apportioned to users based on application of appropriate service units of measurement. The appropriate service unit to cost item relationship is based on that service unit which is the best predictor of the causal factor of cost incurrence. The following are examples of the service unit to cost component relationships:

—Tower Operators—train miles
—Track Maintenance—car miles
—Station Maintenance—Passengers boarding/deboarding

The geographic scope of each cost component must also match the scope of the operating statistics for the applicable service unit.

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[6]The ICC Fully Distributed Cost Factors contained in 49 CFR 1242 assign to each service its solely related or directly assignable costs plus an apportionment of the common costs (both fixed and variable) on a service unit basis.

[7]Base costs as referred to in this document are defined by the Interstate Commerce Commission in Ex Parte No. 417: Costing Methodologies for the Northeast Corridor: Commuter Service.

[8]Direct costs are those incurred as a primary work function of the operation, such as a track gang.

Indirect costs are those incurred in support of a primary work function, such as regional engineering or payroll.

The costs that are determined to be indirect costs, such as supervision, tools and supplies, regional engineering, etc., are allocated to each user through an overhead rate based upon the user's proportional share of the direct costs.

Finally, fully allocated cost compensation requires a contribution to the capital costs incurred by the owning railroad providing the rail facilities. Assets wear out and must be replaced. Depreciation charges are designed to reflect the real economic cost of asset deterioration when the cost is being incurred. Therefore the annual depreciation charge for a solely related or common asset would be assigned to a user on the same basis as other direct costs. For example, the annual depreciation expense for use of a solely related track segment would be charged in full to that user while the depreciation expense for a joint service passenger station would be allocated by a service unit such as passenger boardings or deboardings.

The fully allocated methodology also includes payment for the cost of funds (time value of money). The 'base' costs should be adjusted to reflect the time value of the invested capital i.e. the interest charges of debt financing. The percentage of investment return to be borne by the tenants may be an across-the-board, fixed percentage regardless of tenant traffic, or tied to an index of usage by the tenant.

A fully allocated costing methodology prevents cross-subsidization and is "just and reasonable". These are the basic concepts set forth by Congress and are the constraints that must be placed on a cost allocation methodology.

Interestingly, Amtrak's comments filed in Ex Parte 417 provide guidance on the issue of cross-subsidization and the implications of "just and reasonable"[9].

[9]Amtrak Ex Parte 417; Verified statement of Carl M. Snavely, Jr. at 8.

According to Amtrak witness Carl M. Snavely, Jr., the maximum contribution a user should make is its stand alone costs.[10] If it paid more than its stand alone costs the user would be better off than if it had operated on its own. In contrast other users of the service would be worse off than they would be if service were discontinued to a user who pays less than avoidable cost. Snavely states:

> If the cost sharing methodology results in the payments of each user being between its total avoidable costs and its stand alone costs, than [sic] there can be no 'true' cross-subsidy of one user by another. *Id.* at 9-10.

By definition the fully allocated cost methodology does not exceed stand-alone costs to any user.

Amtrak's summary comments provide greater insight as to what constitutes a 'just and reasonable' method of compensation.

In its comments, Amtrak states:

> The 'just and reasonable' compensation prescribed by the Commission for one railroad's use of another's terminal has always included a full share of the fixed costs of the terminal. Similarly, when called upon to prescribe 'just and reasonable' compensation for operations under trackage rights, the Commission has uniformly required the tenant to contribute its fair share of fixed overhead costs.

Amtrak Ex Parte 417; Brief at 37-38. Footnotes omitted.

It is generally acknowledged that 'just and reasonable' compensation requires all users to cover a "fair" share of the fixed cost of rail lines and terminal. Naturally the application of a fully allocated methodology must be tailored to the circumstance of each case to ensure that the net result is fair and equitable.

[10]Stand alone costs are the costs that a user would incur if it were to operate and maintain all of the facilities required for the service it provides on a single user basis, i.e. without the participation of others.

There are two primary determinants or guidelines that govern the development of an allocation methodology:

—relating to the economic benefit derived
—avoiding a misallocation of resources

As witness Snavely identified:

> Any service which pays less than its stand alone costs receives thereby an economic benefit. Without the economies of joint utilization, the service would have to provide many of the facilities it utilizes at a total cost greater than [sic] that which it incurs under the joint usage. *Id,* Snavely Aff. at 11.

The U.S. Court of Appeals for the Third Circuit[11] also observed, that the benefits of joint usage should be shared by all users and each should pick up some portion of the base costs and no one user should be required to bear all base costs.

If any one user, Metro-North, ConRail or Amtrak, were forced to bear an inequitable or disproportionate share of base costs, either the passenger/commuter or shipper rates or subsidy requirements would be inflated in comparison to one or both of the other users. Users would be compelled to raise fares or rates to cover inflated costs. An equitable and fair distribution of base costs is necessary to avoid a distorted allocation of resources, and cross subsidization.

Capital costs should also be included so that the users of the Hudson Line and Grand Central Terminal are not subsidized through an understated calculation of the costs they incur. Such subsidies would be unjust and unreasonable in that there would be a distortion in passenger/commuter ticket charges and freight rates or an increase to taxpayer outlays. Such a distortion would create incentives to misuse and mismanage the rail lines and terminals.

[11] *SEPTA v. ICC,* 644 F. 2d 238 (3rd Cir. 1981).

In summary, this section has presented the economic principles that support a fully allocated basis of determining "just and reasonable" compensation, required of all users of the Hudson Line and Grand Central Terminal. Briefly put, the fully allocated methodology:

—prevents cross-subsidization;

—ensures that each user contributes in relation to the economic benefit it derives;

—avoids potential for misallocation of resources;

—ensures that the allocation of base costs, including capital costs, are governed by guidelines of fairness and equity; and

—is in accord with Commission rulings which have traditionally required users to contribute its fair share of fixed overhead costs.

III. APPLICATION OF FULLY DISTRIBUTED COSTING

This section of my statement applies the fully distributed costing methodology to Amtrak's use of the Hudson Line.

As cited in the statement describing the fully allocated methodology, the first step in the process is to identify separate and distinct services from the essentially common operations and facilities. Before this is performed the operation is fully analyzed and base service unit data on the operation is gathered and tabulated.

SERVICE UNIT DEVELOPMENT

Service unit data was gathered for the year 1983 by specific line segment of operation for the Hudson Line and Grand Central Terminal. The specificity of these service units allowed the assignment of user activities to the appropriate cost group for analysis by:

—Management responsibility;
—function;
—geographic or physical location.

The following service unit data was gathered and analyzed.

SERVICE UNITS BY USER

GCT—MO

	Amtrak	Metro-North	TOTAL
Trains	5,871	122,610	128,481
Car Entrances.....	15,904	321,114	337,018
Car Miles	175,407	3,468,020	3,643,427

SERVICE UNITS BY USER AND HUDSON LINE SEGMENT

MO—POUGHKEEPSIE (M.P. 5.4-73.6)

	ConRail	Amtrak	Metro-North	TOTAL
Train Miles	117,192	400,403	1,175,199	1,692,794
Car Miles.....	6,851,252	2,156,074	4,481,139	13,488,465
Gross Ton Miles (000)	423,749	189,196	316,591	929,536

MO—DV (M.P. 5.4-11.2)

	ConRail	Amtrak	Metro-North	TOTAL
Train Miles	9,648	34,052	175,264	218,964
Car Miles.....	497,835	183,361	810,580	1,491,776
Gross Ton Miles (000)	30,791	16,090	57,267	104,148

DV—HARMON (M.P. 11.2-33.4)

	ConRail	Amtrak	Metro-North	TOTAL
Train Miles	48,105	130,336	631,190	809,631
Car Miles.....	2,173,956	701,831	2,769,813	5,645,600
Gross Ton Miles (000)	134,459	61,586	195,687	391,732

HARMON—BEACON (M.P. 33.4-59.0)

	ConRail	Amtrak	Metro-North	TOTAL
Train Miles	35,092	150,298	246,426	431,816
Car Miles.....	2,481,523	809,318	573,594	3,864,435
Gross Ton Miles (000)	153,482	71,018	40,524	265,024

BEACON—POUGHKEEPSIE (M.P. 59.0-73.6)

	ConRail	Amtrak	Metro-North	TOTAL
Train Miles	24,347	85,717	122,319	232,383
Car Miles.....	1,697,938	461,564	327,152	2,486,654
Gross Ton Miles (000)	105,017	40,502	113,289	258,808

SOLELY RELATED/DIRECTLY ATTRIBUTABLE COSTS

Hudson Line operations and facilities were analyzed to identify those services solely related or directly attributable to Amtrak's use.

1. JOINT PASSENGER STATIONS

Metro-North provides joint use of two (2) rail passenger stations on the Hudson Line excluding GCT and full use of Metro-North station agents. Amtrak must be apportioned its "fair share" of labor, building rental, facility (buildings, parking lots, platforms, etc.) maintenance, utilities and other material and supplies at the following stations:

- Croton-Harmon (1 dedicated Assistant Agent BRAC-TC—7 day position)
- Poughkeepsie (1 dedicated Assistant Agent BRAC-TC—7 day position)

The following costs should be assigned to Amtrak based on the 1983 costs and method of allocation—weighted ticket sales proportion:

• Croton-Harmon	$ 88,655
• Poughkeepsie	152,682
The annual expenses are	$240,337

Source—Metro-North Accounting System[12]

2. HARMON LOCOMOTIVE "SWAP OUT"

Metro-North puts Amtrak power on and off for Amtrak road crews who by labor agreement will not perform this work at the third rail terminus at Harmon. This work is primarily performed for train number's 48/49 and about twice a week for trains numbers 63/64. Metro-North will also perform inspection, brake test and minor repairs if required. Amtrak engines may also be serviced (fuel, sand, etc.) if required.

Cost method based on time study of applicable work units:

- Train and Engine Crew
- Fuel Paid Employees
- Yardmaster
- Towerman
- Car Inspectors
- Supervision

The annual charge should be $91,210

Source—1983 Special Time Study

3. YARD SWITCHING—GCT

Metro-North spends about 50 switch engine hours a week switching out certain Amtrak trains (#'s 48/49, 68/69, 64/63 and

[12]All Amtrak charges are escalated to third quarter 1984 levels based on the AAR wage, material-price indicies and include appropriate fringe and overhead rates.

62/71) at approximately 10% of all switch engine hours in GCT. Presently, there is one dedicated yard engine (GCT Job #4) with a five (5) man crew that performs almost 100% Amtrak related work.

The former GCT agreement called for the application of formula that would have Amtrak pay 9.67%.

TOTAL ANNUAL CHARGES $308,804

Source—Metro-North Accounting Systems and special time study

4. REPORT CLERKS

There are two (2) dedicated report clerks (BRAC-TC) at the train dispatchers office—347 Madison Avenue who report solely Amtrak times and delays. These are both five day positions.

Amtrak should be charged for two (2) report clerks and an appropriate overhead amount.

Report Clerks $128,726

Source—Metro-North Accounting System

5. MECHANICAL

Metro-North was performing significant car repairs for Amtrak trains at Harmon and GCT (amounting to over one-half million dollars a year). Metro-North is now performing moderate locomotive maintenance work on FL-9 and F-40 engines and costs are accumulated on a work order basis for emergency or other required repairs.

In 1983 costs were partially accumulated; other costs will be further tabulated.

TOTAL AMTRAK MECHANCIAL $10,245

Source—Metro-North Accounting System

6. MAINTENANCE OF WAY

Amtrak should be charged directly for any off territory maintenance of Amtrak plant on a work order basis if Agreed to by

Metro-North management. Metro-North performed a small amount of work off the Hudson Line in 1983.

The cost for performing this category maintenance for the Hudson line was:

OFF TERRITORY MAINTENANCE TOTAL CHARGE $1,437

Source—Metro-North Accounting System

7. THIRD RAIL USE—GCT

Amtrak's third rail energy consumption and contribution to electrification maintenance requirements while on GCT tracks both mainline and switching.

Per application of the third rail power formula, which Amtrak has accepted, to 1982 electric consumption/traction costs, (1983 costs are being calculated) Amtrak would be responsible for:

TOTAL ANNUAL THIRD RAIL POWER CHARGES $377,758

Source—Third Rail Power Formula

8. GARBAGE REMOVAL—GCT

Commissary Garbage

Amtrak uses two (2) containers (10½ cu yard) in the commissary area for which there is six (6) day a week contracted garbage pick-up averaging $2,100 per month.

Contracted Service $25,200

Train Garbage

Metro-North provides containers and garbage removal service for all Amtrak trains in GCT. This garbage is placed in four (4) containers (22 cu yard) on track 22 and removed twice (2) a week on two (2) flat cars, which Amtrak "fills at least two (2) containers/one (1) flat car. Twice a week a "hot foot" train move takes

these cars to Harmon where they are unloaded and removed to an incinerator by a Contractor.

—Container Rental ($60/wk/ct.)	$ 6,240
—Contracted Dumping at Harmon ($220/unld./ct/)	22,880
—Crew Cost approx. 4 hour move twice a week	20,865
—Loco Ownership Cost	2,500
—Flat Ownership	1,000
—Propulsion plus Supplies	5,000
TRAIN GARBAGE SUB TOTAL	$58,485
TOTAL CONTRACTED SERVICE	$25,200
TOTAL GARBAGE REMOVAL	$83,685

Source—Special Study

9. DIRECT USE OF SPACE—GCT

Amtrak uses space provided by Metro-North for its operations and general business functions throughout GCT.

The following are the direct categories of space use and a mimimum rental charge associated with each:

• Commissary facility on track 105 and associated space (approx. 3,300 sq. ft.*)	$ 66,000
• Common Maintenance of Equipment-Welfare facility off-track 100 (Amtrak portion (50 sq. ft.*)	1,000
• Red Cap Room (50 sq. ft.*)	1,000
• Baggage Room (200 sq. ft.*)	4,000
• Space under Pan Am escalators for Amtrak Car Dept. (600 sq. ft.*)	12,000
• Amtrak Ticket Office (400 sq. ft.**)	120,000
• Track Space for Permanent Baggage Car (60 ft.)	1,000
• Commissary Storage on Track 22 (200 sq. ft.*)	4,000
SUB TOTAL	$209,000
LANDLORD FEE (5%)	10,450
TOTAL COSTS	$219,450

*$20 per year per square foot.
**$300 per year per square foot.

Source—Special Study

10. PLATFORM AREA

Utility Power consumption—GCT

All electrical services are tied into the general services which Metro-North has in Grand Central Terminal.

Metro-North identifies specific billable services through submeters which measure kilowatt hour consumption monthly. Two Amtrak areas are submetered by Metro-North in Grand Central Terminal: the Amtrak commissary and Amtrak's 480-volt train standby service. In 1983 the commissary used 152,110 kilowatt hours and the 480-volt standby service consumed 1,083,400 kilowatt hours. The consumption figures for 1983 represent the latest information which Metro-North has available.

Commissary Utility	$ 21,233
480 Volt -Standby Service	151,246
TOTAL GCT PLATFORM UTILITY CHARGES.	$172,479

Source—Meter Reading Bills

11. TIMETABLE PRINTING

Amtrak is charged under work order number 6007 for printing of Employer Timetables to be used by Amtrak personnel. Amtrak has agreed to pay for 42% of any printing revisions. Forty-two (42) percent of the 1983 VA Graphics bill of $45,895.

TOTAL ANNUAL CHARGES OF	$19,276

Source—Metro-North Accounting System

12. OTHER CHARGES

There are several other categories of solely related or directly attributable charges to Amtrak that are in the process of being tabulated and is not quantified in this presentation.

For example, Metro-North fuels (diesel) various Amtrak locomotives at Harmon either on an emergency basis or more regularly when "swapping out" locomotives.

A fuel slip is made out at the Harmon fuel pad "every time" an Amtrak locomotive is fueled. These fuel consumption documents are presently being funneled through to the accounting department for bill tabulation.

Another example is the service Metro-North provides for the handling of Amtrak mail for placement on two (2) northbound trains and pick-up off of one (1) southbound train, which is transferred by truck from/to Penn Station. A special study will be undertaken to identify those costs directly attributable to Amtrak.

TOTAL SOLELY RELATED, AND DIRECTLY ATTRIBUTABLE CHARGES TO AMTRAK..... $1,653,407[13]

[13]All charges are escalated to 3rd quarter 1984 levels based on the AAR wage, material—price indicies.

COST BASE DEVELOPMENT AND METHODOLOGY APPLICATION

The cost base used for application of the fully allocated methodology as well as the identification of the solely related and directly attributable costs discussed, was 1983 actual.

The following were the total Metro-North costs for the year 1983:

1983 Actual Costs by Line ($000)

	Costs[14]	% of Total
Harlem/Hudson Line	$127,578.7	41.2%
New Haven Line	79,893.8	25.7%
Grand Central	36,885.8	11.9%
System Headquarters	65,724.3	21.2%
	$310,082.6	100%

As is readily identifiable the Hudson/Harlem Line and Grand Central the "affected" area by Amtrak's operation under this proceeding comprise over 50% of Metro-North costs not including assignment of System Headquarters costs.

Costs for the Hudson Line and Grand Central were segmented in several ways to allow the most accurate, prudent and equitable assignment of Amtrak's common costs.

The primary cost functions to be analyzed in a trackage right or Terminal sharing agreement is that of maintenance of way. For this purpose costs were generated by each Hudson line and Grand Central Cost Center. (*See*, Exhibit B for a summary of Hudson Line Maintenance costs by cost center.) Metro-North Cost Centers are segment or locational units for the accounting of costs, while Management Centers, are functional or management responsibility units for the accounting of costs.

Through Metro-North's accounting system special programs were developed to generate the maintenance costs by these centers with the following direct costs:

—straight time labor
—premium time
—other expenses
—material

[14]Does not include the Port Jervis line operation which cost $25.6 million to operate, but services are provided by New Jersey Transit.

Then another program was developed to apply labor additives and overhead expenses. These included fringe rates for the direct expenses and overheads such as the regional engineering department. Management Center were selectively removed from these Cost Centers to reflect remaining costs that would be applicable to Amtrak's use of the Line and facilities, those removed were:

—all electric traction Management Centers—the operating maintenance for the third rail system are included in the third rail power formula,
—the structures account was adjusted to remove passenger stations maintenance, Harmon shop etc.,
—Track and Communication and Signal (C & S) accounts were adjusted to remove such items as non-joint yard switching track.

All adjustments to these maintenance costs for each Cost Center are reflected in Exhibit B.

Each segment and functional maintenance account was then analyzed to determine Amtrak's cost impact on the operation. In general the application of service unit to cost was as follows:

—Track - car miles
—C & S - train miles
—Structures - car miles

Although gross ton miles is actually a more appropriate unit of measurement to allocate track and roadway structures expenses than car miles, this statement uses car miles. The use of car miles is to Amtrak's advantage.[15]

In summary Amtrak's use based maintenance cost for operation over the Hudson Line through to GCT was as follows:

Hudson Line	$2,228,981
Grand Central (GCT to MO)	704,720
TOTAL AMTRAK RELATED MAINTENANCE	$2,933,701

[15]*See* discussion in *Special Court EL Opinion,* 531 F. Supp. 1191, 1342-1343 (1981), hereafter referred to as Special Court EL Opinion.

Transportation—Hudson Line

The relevant direct transportation accounts were developed by Management Center. Cost Centers were not used since certain overheads would have been applied to direct accounts such as dispatching to trainmen and enginemen costs. This would have been an incorrect assignment for this methodology in that dispatching should be related to the train movements across the rail line in which Amtrak shares use.

The specific transportation Management Center accounts that were analyzed regarding Amtrak's use were as follows:

Towers/Interlockers

- Hudson (DV, HM, OW, CD)
- 59th - MO (NK, DB, MO)
- GCT (A, B, C, U)

[Related to train movements]

Hudson work train

[Overhead to certain maintenance accounts]

—Dispatching

- CD - Rensselaer
- MD - CD
- Chief Train Dispatcher

[Related to train movements]

—Trainmaster Hudson

[Overhead to Hudson direct transportation costs]

Hudson Police

[Based on number of station stops]

Amtrak's direct user share portion of these costs is $621,863.

Grand Central Terminal

Grand Central Terminal costs were also examined on a Management Center basis including both terminal and transportation operations.

The specific areas analyzed as to Amtrak's use were as follows:

Passenger Terminal
—General Stations Master
—Building Services
—Information Bureau
—Police/Security

[Related to Amtrak service and passenger use]

Transportation
—Terminal operations
—Towers

[Related to Amtrak's train entrances]

Amtrak's user share of common GCT costs is $437,428.

Transportation and System Overheads

Two overhead expense applications were developed to complete the identification of Amtrak's fully distributed trackage rights cost compensation requirement, a Transportation department overhead to those directly related Management Center costs and a System-Administrative overhead to be applied to all costs except Maintenance of Way. The Maintenance of Way department was not included as a result of Administrative overheads being included in those specific Cost Centers.

The Transportation overhead factor was determined based on Amtrak's direct cost sharing proportion of total Metro-North transportation base costs, including T & E. This overhead percent (1.8%) was applied to the department Management Centers:

—Vice President Operations
—Chief Operations Analysis
—Manager of Administration
—General Superintendent Transportation
—Superintendent Transportation
—Supervisor of Operations Rules

The transportation overhead costs associated with Amtrak's use of the Hudson Line and GCT is $59,760.

System Administrative costs were examined to identify those that would be related to Amtrak's operation over the Hudson Line and GCT. Those that were determined not to be relevant were removed from the overhead base, (e.g. public relations). The administrative overhead factor was determined based on Amtrak's direct cost sharing proportion of total Metro-North base costs including non-Amtrak related functions such as the Mechanical Department.

The system—overhead costs associated with Amtrak's use of the Hudson Line and GCT is $364,080.

Operating Cost Summary

In summary, Amtrak should pay Metro-North in connection with all functions performed by Metro-North on the Hudson Line and in Grand Central Terminal.[16]

• Solely related and directly attributable charges	$1,653,407
• Maintenance of Way	3,139,060
• Hudson Line Transportation	665,393
• Grand Central Terminal	468,048
• Transportation and System—Administrative Overhead	453,509
TOTAL AMTRAK OPERATING COMPENSATION REQUIRED	$6,379,417

CAPITAL COSTS

Capital projects (rehabilitation/replacement of assets) result in two kinds of costs for Metro-North:

- depreciation expense,
- debt (interest) expense.

[16]All charges were escalated to third quarter 1984 levels based on the AAR wage, material—price indicies.

The depreciation expense results from capitalizing a project, i.e., classifying the initial cost of the project as a change of assets (e.g., cash into the capital project asset). As a result of capitalizing projects, entering the books as an asset rather than an expense, an adjustment is required to account for the use (decrease in life and worth) of the asset; this adjustment, obviously is depreciation. Depreciation is truly a cost to the asset owner since it represents a loss in the value of the owner's assets.

Debt expense is incurred when a capital project is funded. The money required to finance projects is obtained at a cost, currently 11% for Metro-North (September 1984 bond rate). Although this cost is reflected in an account separate from the capital project, it clearly is a cost incurred as a result of the project.

Amtrak should pay its fair share of capital costs (see discussion on p. 21-22). Calculation of this share should be based upon the benefit Amtrak receives from the project relative to the benefit of Metro-North and/or Conrail. Thus the first step is to accumulate the capital project information and categorize it for allocation. Allocation factors should be "just and reasonably" defined service units[17] bearing close relationship to the benefit received from the project and/or the cost (e.g., wear and tear) attributable to each party which necessitates the undertaking of the project.

The capital costs of each project occur over a number of years because the useful life of projects, and thus the depreciation of projects, generally spans many years. Therefore, the capital costs in any given year will be comprised of the depreciation and debt expense resulting from projects funded and completed in a number of different years. Specifically, the depreciation expense, if using the straight-line method, will be equal to the sum of a year's depreciation of all assets (capital projects) remaining on the "books." The debt expense for the year (more commonly referred to as return on investment) will be the total current book

[17]For example, car miles, number of passengers, car entrances, etc.

value of all the assets (capital projects) multiplied by the current interest rate on debt, 11% for Metro-North. The sum of the depreciation expense and the debt expense is the total cost of capital.

This method of calculating return on capital was chosen because it is a very conservative approach of formulation. The generally applied method as submitted in Amtrak's testimony in X-417 calls for inflating the asset base to present dollars, essentially assigning market value to the asset base, not book value.[18] This would yield compensation for a fair return much greater than the contribution requirement identified herein.

Once Metro North's full historical profile of capital investments is compiled, including a property valuation, Amtrak's compensation requirement for capital costs will be re-computed through a numerical method applied to the asset base at fair market value.

Capital Cost Base

The methodology employed the base year, 1983, selected because it represents the most comprehensive and accurate information.

Metro-North is presently compiling a full and auditable historical profile of its capital investments. In the past it has maintained accessible records for only those capital projects funded that were invested directly through Metro-North. Metro-North's compilation will incorporate all investments made by the MTA starting with the high platform station projects in 1971.

The year 1983 served as the base for assigning approximate project costs for the previous years used in the calculations. Due to the current lack of available actual capital cost investment data

[18]Amtrak Ex Parte 417.

for each previous investment year the calculations can more accurately be accomplished using the 1983 base year than with existing historical data. Adjustments for prior years were accomplished with the AAR wage material price indicies (excluding fuel).

The 1983 capital project costs to be allocated totaled $8,222,000. After assignment of non-line specific Metro-North region (Harlem, Hudson and New Haven) project costs to the Harlem/Hudson Lines versus Grand Central Terminal based upon physical plant or service measurements, e.g. track miles. Amtrak's portion was derived based upon Amtrak's percentage of total service units, primarily car miles 16.0% on the Hudson Line and on the section of line and facilities from GCT to MO and on the segment from GCT to Mott Haven 4.8%.[19] For Grand Central Terminal improvements, the percentage of total passengers was used since that statistic is the most representative of the relative benefits received for those projects. For station improvements, the Hudson Line stations were first separated from the Harlem and New Haven Line stations, and then Amtrak and Metro-North were assessed costs based on an equitable sharing of the two stations Amtrak uses and a 100% assignment of other station costs to Metro-North.

The depreciation expense attributable to Amtrak of capital projects is $1,192,200. This is arrived at by using the base year 1983 and the Association of American Railroads (AAR) indicies to historically deflate the investment base and assuming an average 10 year useful life is for assets. The debt expense (return on investment) based upon the 1983 book value of capital projects (approximately $6,290,000) and an 11% return equates to $691,900. Amtrak's total share of 1983 capital costs therefore should be $1,884,100 (inflated to third quarter 1984 dollars this equates to $2,016,000).

[19]Special Court EL opinion, *see* discussion of car miles as best predictor of joint use.

In summary, total compensation required of Amtrak for its fair usage based share of Hudson Line and Grand Central Terminal facilities and services is as follows:

Solely Related and Directly Attributable Charges	$1,653,407
Common Base Costs	4,726,010
Capital Costs	2,016,000
TOTAL	$8,395,417[20]

IV. AMTRAK'S PRESENTATION

In this proceeding Amtrak presented a costing methodology and identified certain costs related to its operation, as well as its estimate of Metro-North costs, to which it applied its costing methodology. Counsel requested that, in this section of my statement, I assume *arguendo* the appropriateness of Amtrak's proposed methodology and comment on its application herein.

Naturally, a methodology can only yield a valid result if the base to which it is applied is complete and accurate. If the base is lacking integral elements, the application of the methodology will yield invalid results.

Listed briefly below are some of the more glaring omissions, misstatements and inaccuracies in Amtrak's filing herein.

a. No consideration is given to long term avoidable costs.

b. Amtrak erroneously assumes that because Metro-North occasionally uses the two "prime" tracks dedicated to Amtrak's use in Grand Central Terminal, that, absent Amtrak, Metro-North would not alter its operation to eliminate the use by Metro-North of two less convenient tracks. The two dedicated tracks are solely related to Amtrak operations.

c. Amtrak ignored the actual cost of removing its garbage from Grand Central Terminal and substantially understated the cost thereof. *See* section III.

[20] All charges are escalated to third quarter 1984 levels based on the AAR wage, material—price indices.

d. Amtrak applied its SFGT formula to an understated cost base.

1. Amtrak applied its SFGT formula to a base of $4,309,661, when in fact the base, is $28,162,091.

2. The maintenance cost of structures, bridges, communications and signals were not fully incorporated in the cost base.

3. The weight of all of Amtrak's locomotives is not in the SFGT formula. This is significant in light of the fact that most of Metro-North's operation depends upon the use of self-propelled cars, which obviously have the weight of their traction motors in each car.

e. Amtrak failed to note that but for Amtrak's operation on the Hudson Line, Metro-North would have three tracks between Spuyten Duyvil and Croton-Harmon.

f. Without explanation Amtrak states that the cost for its electrical use should be $33,015, when in fact the application of a power formula, the validity of which was agreed to by Amtrak, results in $377,758 for electrical use.

This listing is by no means exhaustive of the problems with Amtrak's presentation. However, the foregoing indicates either Amtrak's lack of understanding concerning Metro-North, as well as its own operation on the Hudson Line or an attempt to ignore the actual cost of operation on the Hudson Line.

VERIFICATION

STATE OF NEW YORK
COUNTY OF NEW YORK

T. Stephen O'Connor, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

T. Stephen O'Connor

Subscribed and Sworn to
before me this the
17th day of September, 1984

ROBERT M. GUSTAFSON
Notary Public, State of New York
No. 4[illegible]27
Qualified in Westchester County
Commission Expires March 30, 1986

EXHIBIT B

HUDSON MAINTENANCE OF WAY

Costs By Operating Segment
(1983 $)

Cost Centers	Maintenance Costs
MO—Spuyten Duyvil	
Track	$ 892,694
C & S	33,535
Structures	94,631
TOTAL	$ 1,020,860
Spuyten Duyvil—Croton North	
Track	$ 3,924,022
C & S	2,170,598
Structures	695,510
TOTAL	$ 6,790,130
Croton North—Beacon	
Track	$ 699,804
C & S	879,703
Structures	399,912
TOTAL	$ 1,979,419
Beacon—Poughkeepsie	
Track	$ 666,323
C & S	478,606
Structures	195,210
TOTAL	$ 1,340,149
Poughkeepsie—CP 75	
Track	$ 39,543
C & S	48,965
Structures	74,222
TOTAL	$ 162,730

Cost Centers	Maintenance Costs
Poughkeepsie—Rensselaer	
Track	$ 13,189
C & S	33,282
Structures	25,671
TOTAL	$ 72,142
Supv. of Repairs—MO—Poughkeepsie	
Track	$ 1,996,856
C & S	353
Structures	609
TOTAL	$ 1,997,818
TOTAL HUDSON LINE MAINTENANCE	$13,363,248

Costs "affected" by Amtrak's use

Supreme Court, U.S.
FILED
NOV 25 1986
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No. 86-409

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY and
METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA and
NATIONAL RAILROAD PASSENGER CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NATIONAL RAILROAD PASSENGER CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that an order by the Interstate Commerce Commission (ICC) requiring the continued exercise of trackage rights by one railroad over the line of another railroad does not constitute a "taking" of the latter's property under the Fifth Amendment.

2. Whether, assuming *arguendo* that a "taking" occurred, it is constitutional for the ICC, rather than an Article III court, to calculate compensation in the first instance, subject to judicial review by an Article III court; and whether, under the facts in this case, the compensation awarded is constitutionally adequate.

PARTIES

All of the parties are named in the caption above.*

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* National Railroad Passenger Corporation ("Amtrak") is a corporation chartered under the laws of the District of Columbia in accordance with section 301 of the Rail Passenger Service Act, 45 U.S.C. § 541. Amtrak is not a subsidiary of any other corporation. Amtrak owns 100% of the capital stock of the Chicago Union Station Company and of the Washington Terminal Company.

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No. 86-409

METROPOLITAN TRANSPORTATION AUTHORITY and
METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA and
NATIONAL RAILROAD PASSENGER CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR NATIONAL RAILROAD PASSENGER CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 792 F.2d 287. The memorandum opinions and orders of the ICC (Pet. App. 26a-33a, 34a-46a, 47a-73a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1986. The petition for a writ of certiorari was

filed September 2, 1986, and, after being corrected to comply with this Court's rules, was refiled September 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner Metropolitan Transportation Authority ("MTA") is an agency created by the State of New York to preserve, operate and improve mass transit, including commuter rail service, in the New York metropolitan area. In order to qualify for substantial federal aid for rehabilitation of rail commuter service, MTA acquired by purchase or lease various rail properties in the New York area which are operated by its railroad subsidiaries, including Metro-North Commuter Railroad Company ("Metro-North"), a co-petitioner.

Respondent National Railroad Passenger Corporation ("Amtrak") was created pursuant to the Rail Passenger Service Act ("RPSA") to provide intercity rail passenger service throughout the United States. 45 U.S.C. §§ 501 *et seq.*; *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 105 S.Ct. 1441, 1445-47 (1985). Because intercity rail passenger operations in this country have been unprofitable for many years, Amtrak's operating deficits—currently approximately $600 million per year—are funded by federal appropriations.

Ever since it commenced operations in 1971, Amtrak has provided intercity rail passenger service between Grand Central Station in New York City and Albany over the so-called Hudson line. Initially, these services were provided by agreement with Penn Central, the owner of the line, whereby Penn Central operated Amtrak's trains for Amtrak's account. In 1972, Penn Central leased to MTA the portion of the Hudson line between Grand Central and Poughkeepsie, reserving from the conveyance the trackage rights necessary to continue to operate its freight trains and Amtrak's passenger

trains. Contemporaneously, Penn Central also agreed to provide, as MTA's agent, rail commuter services over the leased line.

Consolidated Rail Corporation ("Conrail") supplanted Penn Central when, effective April 1, 1976, Penn Central's trustees conveyed to that federally-created railroad, the trackage rights for freight and intercity passenger operations that had been reserved under the MTA lease.[1] Conrail also took over Penn Central's operation of commuter service that had been provided under the MTA-Penn Central Service Agreement. The Amtrak-Penn Central Operating Agreement was replaced by a new Amtrak-Conrail Operating Agreement, effective April 1, 1976, that provided for the continued operation of intercity rail passenger trains over the Hudson line to Grand Central. From that date through December 31, 1982, all rail operations over the Hudson line were managed by Conrail, using Conrail train crews: freight service (for its own account), intercity passenger service (for Amtrak's account), and commuter service (for MTA's account).

In 1981, as part of an effort to return Conrail to the private sector, Congress adopted the Northeast Rail Service Act ("NRSA"), 95 Stat. 643. One of its purposes was to free Conrail from commuter service responsibilities by transferring them to other "entities whose principal purpose is the provision of commuter service." NRSA, § 1133(a), 45 U.S.C. § 1102(2). The statute expressly relieved Conrail of any legal obligation to operate commuter service effective January 1, 1983. 45

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[1] This conveyance was part of the federally-assisted restructuring of the Northeast rail industry contemplated by the Regional Rail Reorganization Act of 1973, the constitutionality of which was upheld by this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). The federal government spent approximately $7 billion to acquire and rehabilitate the rail properties conveyed to Conrail, which was the principal vehicle for preserving essential rail freight service in New York and the rest of the northeastern United States.

U.S.C. § 744a. It also provided MTA and other commuter authorities with the option of contracting with a new envisoned entity, "Amtrak Commuter," for the provision of commuter services. 45 U.S.C. §§ 581-591. Neither MTA nor any other commuter authority chose to avail itself of this option, and Amtrak Commuter was stillborn. Instead, MTA organized its subsidiary Metro-North to manage the properties leased from Penn Central in 1972 and to operate commuter service to and from Grand Central.

The present proceeding results from the transfer of management of MTA's leased properties on the Hudson line from Conrail to MTA's own subsidiary, Metro-North, which occasioned the need for an additional agreement, effective on and after January 1, 1983, between Amtrak and the new manager, Metro-North. When negotiations for such an agreement stalemated, Amtrak initiated this proceeding before the ICC pursuant to Section 402(a) of RPSA, which empowers the ICC to order that Amtrak be provided use of tracks and facilities and to establish just and reasonable compensation. Petitioners reacted by seeking declaratory relief in the Special Court established by the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 1105 ("Special Court").[2]

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[2] Petitioners asked the Special Court to declare (a) that Amtrak had no trackage rights over the Hudson line except as those rights were created by Section 504(f) of RPSA, 45 U.S.C. § 584(f), (b) that the "creation" of such trackage rights was an act of eminent domain by the United States and (c) that Petitioners were entitled to just compensation under the Fifth Amendment. Petitioners' motion for summary judgment on these claims was denied by the Special Court on November 23, 1984. *Consolidated Rail Corp. v. Metro-North Commuter R.R.*, 598 F. Supp. 1571 (not appealed). In that opinion, Judge Friendly concluded that there was no Fifth Amendment taking. *Id.* at 1583. Thereafter, MTA amended its counterclaim against the United States, contending that Congress' cancellation of the commuter service contracts as part of the effort to return Conrail to the private sector constituted a Fifth Amendment taking. This claim was also rejected by the Special Court

In its application to the ICC, Amtrak proposed to reimburse Metro-North for the incremental or "avoidable" costs that Metro-North incurs by reason of Amtrak's operations on the Hudson line, *i.e.*, all the additional costs incurred by Metro-North as a result of Amtrak's operations over MTA's facilities. In addition, Amtrak proposed a system of "incentive payments" based on on-time performance of its trains on the Hudson line. This system was essentially the same compensation system as contained in the operating agreements with the various private freight railroads over which Amtrak operates and offered Metro-North the opportunity to earn up to $1.2 million per year above its incremental costs.

Both before the Special Court and the ICC, Petitioners unsuccessfully challenged the jurisdiction of the ICC to establish trackage charges, contending that the Fifth Amendment required that compensation be determined by an Article III court. The Special Court, per Judge Friendly, refused to enjoin the ICC proceeding, finding that the claim of unconstitutionality was "not substantial" in light of *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 147-148 (1946). (Pet. App. 137a-141a)

The ICC initially sustained its jurisdiction under Section 402(a) of the RPSA and denied the motion to dismiss in a decision entered July 27, 1984. (Pet. App. 26a-33a) After the submission of evidence by both sides, Petitioners renewed their challenge to the ICC's jurisdiction, again contending that Section 402(a) of RPSA violated the Fifth Amendment. The ICC, by order entered Ocotber 25, 1984, rejected these arguments, finding that no "taking" had occurred because Metro-North retained the right to use its property and moreover that even where a taking does occur, it was constitutional for Congress to delegate to an agency the task of determining

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in the final disposition of that case. *Consolidated Rail Corp. v. Metro-North Commuter R.R.*, 638 F. Supp. 350 (1986) (not appealed).

compensation, subject to judicial review. (Pet. App. 40a-41a)

The ICC's final decision, dated July 5, 1985, adopted the costing principles and incentive payment program proposed by Amtrak. (Pet. App. 47a-70a) The ICC directed the Petitioners to "continue to make available to Amtrak (a) the space and facilities now used by Amtrak at Grand Central Station, Croton-Harmon Station, and Poughkeepsie Station, and (b) all trackage and related facilities between Grand Central Station and Milepost 75.8 on the Hudson line." The order further directed Metro-North to "continue to provide" certain specified ancillary services. In return, Amtrak was directed to pay all incremental costs incurred by Metro-North (estimated by the parties at approximately $800,000 per year) plus the incentive or performance payments for on-time service (estimated at up to $1.2 million per year).[3] The ICC concluded that its award of incremental costs would "place Metro in a no better or no worse position than if Amtrak did not make use of Metro's facilities" and that the bonus potential would give "Metro an incentive to improve its service." (Pet. App. 50a-51a, 66a-73a)

The Court of Appeals for the Second Circuit affirmed the Commission's decision. (Pet. App. 1a-25a) Finding first that the ICC properly exercised its jurisdiction under Section 402(a) of RPSA, the court then turned to Petitioners' claims that Section 402(a) was unconstitutional. It rejected Petitioners' argument that the Constitution required adjudication of just compensation for trackage rights charges by an Article III court. Agreeing with Judge Friendly's conclusion in the related Spe-

[3] By agreement of the parties, the ICC's compensation award (other than incentive payments) was made retroactive to January 1, 1983. (Pet. App. 68a) Moreover, the estimated amounts assumed by the ICC have been adjusted and are likely to continue to be adjusted by agreement of the parties in connection with working out the details of daily railroad operations.

cial Court case, Judge Oakes concluded that the issue was governed by this Court's decision in *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946), and that "*Thompson* unquestionably stands for the proposition that the delegation of power to the ICC to set trackage rates, subject to ultimate judicial review, is constitutional." (Pet. App. 17a-19a)

The court then rejected Petitioners' claims that Section 402(a) of RPSA was unconstitutional in basing awards on avoidable costs. First, it agreed with the ICC that a Section 402(a) proceeding does not involve a "taking" within the meaning of the Fifth Amendment but rather was regulation of a nature consistently upheld by this Court in cases spanning a century. The court went further, however, and held that, assuming *arguendo* that there was a Fifth Amendment "taking," the ICC's award met Fifth Amendment standards since "MTA, in obtaining avoidable costs, will receive what it would have had but for the taking." (Pet. App. 19a-20a)

ARGUMENT

The court of appeals correctly affirmed the ICC's decision and correctly held that Section 402(a) of RPSA is constitutional. The court's holding does not conflict with any decisions of this Court and is consistent with the decisions of other courts of appeals. The case does not warrant this Court's review.

1. An ICC Order Under Section 402(a) Is Not A Taking.

Petitioners' threshold argument that Amtrak's continued exercise of trackage rights over MTA's Hudson line constitutes a "taking" of the latter's property is contradicted by the undisputed facts of this case, the decisions below, the related decision by Judge Friendly in the Special Court and over 90 years of federal decisions.

The ICC's order took nothing from Petitioners. It simply required them to "continue to make available to

Amtrak" rail facilities which Amtrak had been using under agreements with Metro-North's predecessors. (Pet. App. 68a)

For well over a century, Congress and the various states, acting within their regulatory powers, have required railroads to allow other railroads to use their tracks and related facilities under trackage rights arrangements. This Court's decision in *Union Pacific Ry. v. Chicago, R.I. & P. Ry.*, 163 U.S. 564 (1896), put to rest any contention that such trackage rights arrangements "took" any property of the owning railroad. There the Court noted that the trackage rights user "had no possession before its trains came on the tracks, or after they had run off of them; and while its trains were on the tracks, its possession was only of the particular part occupied temporarily while running over them." *Id.* at 582. Noting that "in England and in this country, railroads, when first constructed, were by the legislatures and the people regarded and treated as public highways for the use of all who had occasion to run their vehicles thereon" (*id.* at 585), the Court went on to conclude that under the trackage rights arrangement before it, the Union Pacific had not been deprived of any part of its public franchise or its private property. *Id.* at 589.

The decision of this Court in 1896 in *Union Pacific* has been followed consistently by this Court, the Special Court, and courts of appeal.[4] Petitioners have advanced

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[4] Thus, following *Union Pacific*, in *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 at 140, this Court noted that the trackage rights agreement created only a "personal obligation and did not purport to grant Brownsville [the user] any estate in the property of Tex-Mex [the owner]."

The rule that trackage rights do not "take" any part of the owner's property has been consistently followed by the courts that have passed on the issue. Thus, the Special Court as recently as 1984 determined under the same facts as were presented in this case that there was no "taking" of Petitioners' property. *Consolidated*

no cogent reasons why this 90-year-old line of precedent should be abandoned. Instead, they ignore it.[5]

Railways, like public roads, the navigable waters and the airways, are public highways. *E.g., Union Pacific, supra,* 585; *Wisconsin, M. & P. R.R. v. Jacobson,* 179 U.S 287, 296-97 (1900). If the use of such public highways by trains, motor vehicles, vessels and aircraft constitute "takings" under the Fifth Amendment, then there are literally millions of takings occurring each day in the United States. We seriously doubt whether this Court would wish to entertain this view. Even in *United States v. Causby,* 328 U.S. 256 (1946), where aircraft flew far below the public airspace, the Court held there could be a taking only if they were "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.,* 266. Petitioners, however, make no claim that Amtrak's trains in any way interfere with their own operations.

Rail Corp. v. Metro-North Commuter R.R., 598 F. Supp. 1582-83. Metro-North took no appeal after this decision became final. *Accord, In re New York, Susquehcnna & Western R.R.,* 160 F.2d 29, 31 (3d Cir. 1946), *cert. denied,* 331 U.S. 844 (1947); *Louisville & Nashville R.R. v. M/V Bayou Lacombe,* 597 F.2d 469, 471 (5th Cir. 1979); *Gibbons v. United States,* 660 F.2d 225, 229 (7th Cir. 1981); *Gibbons v. United States,* 660 F.2d 1227, 1238-39 (7th Cir. 1981); *Chicago, M. St.P. & P.R.R. v. Chicago, R.I. & P. Ry.,* 138 F.2d 268, 270 (8th Cir. 1943), *cert. denied,* 320 U.S. 804 (1944).

[5] Petitioners divert attention from the controlling precedent by making an unsound analogy to 49 U.S.C. § 11125, which authorizes the ICC to direct one railroad involuntarily to take over traffic and employees as well as possession of the lines of another railroad for up to 240 days under certain conditions when the other "cannot transport the traffic offered to it." That section does not apply here because Amtrak is not taking over traffic, employees, and possession. But even in that type of situation, which analytically is much closer to "taking" since it involves a complete physical occupation of the property of the other railroad, there is no "taking" present. *Lehigh & New England Ry. v. ICC,* 540 F.2d 71, 81-82 (3d Cir. 1976), *cert. denied,* 429 U.S. 1061 (1977) (cited by Petitioners). Petitioners cite no decision to the contrary.

2. It Was Not Unconstitutional For The ICC To Determine Compensation In The First Instance.

Even assuming *arguendo* that the ICC's order constituted a Fifth Amendment taking, none of the cases cited by Petitioners supports their contention that an Article III court, rather than the ICC, must determine compensation in the first instance. The Fifth Amendment simply states that "private property [shall not] be taken for public use without just compensation." It contains no limitation on the means by which the amount of compensation due may be ascertained, and this Court has long recognized the propriety of permitting non-judicial bodies to participate in the process.

Moreover, the decisions Petitioners cite merely establish that an Article III court must *ultimately* determine whether the regulatory action is within constitutional and statutory bounds. Railroad regulation is a legislative, not a judicial, act. Initially, Congress left most such regulation to the states, which exercised their authority over trackage rights arrangements through state railroad commissions. Congress also acted directly and by the dawn of the twentieth century had enacted over 350 acts requiring the grant of trackage rights. *Union Pacific R.R. v. Mason City & F.D. R.R.*, 199 U.S. 160, 167 (1905). This conflicting patchwork of regulation led to the Transportation Act of 1920 in which Congress centralized all regulation of trackage rights with the Interstate Commerce Commission, giving it exclusive jurisdiction to regulate trackage rights arrangements. The Court approved this action in *Transit Commission v. United States*, 289 U.S. 121 (1933).[6]

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[6] Ironically, *Transit Commission* involved the Long Island Railroad, which is now a subsidiary of Petitioner MTA, and Penn Station, which is now owned by Respondent Amtrak. The Court held that the ICC, rather than New York's regulatory commission, had jurisdiction to set rates for the Long Island's trackage rights into Penn Station. Fifty years later, neither MTA nor the Long Island came forward to question the ICC's jurisdiction to prescribe

Thereafter, in *Thompson v. Texas Mexican Ry., supra*, this Court went further and held that the ICC's jurisdiction preempted even the federal courts:

> "[I]t is more consistent with this scheme of regulation for the Commission rather than courts or juries to determine the amount of the rental. Any legal, including constitutional, rights of Tex-Mex are protected by the review which Congress has granted the orders of the Commission." 328 U.S. at 150.[7]

The soundness of this Court's holding in *Thompson* has never been questioned. It was followed by the court below as it has been in other circuits. *E.g., Chicago & N.W. Ry. v. Chicago, M. St. P. & P. R.R.*, 502 F.2d 193 (7th Cir. 1974). Petitioners cite no arguably conflicting authority arising under railroad regulation.[8]

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compensation terms for trackage rights for commuter trains operating on Amtrak's rail lines. *Costing Methodologies for the Northeast Corridor: Commuter Service*, 367 I.C.C. 192 (1983).

[7] All the reasons that supported the Court's conclusion in *Thompson* apply with equal force to Section 402(a). Determinations under that section require specialized expertise and the effectiveness of the statute depends upon its uniform and predictable administration.

[8] Petitioners do not argue that *FCC v. Florida Power Co.*, No. 85-1658 (argument scheduled, Dec. 3, 1986), is in any way applicable to the instant case. The issues in *Florida Power* are in fact different from the question presented here. This case does not involve a cognizable taking or (in view of a century of railroad regulation) the frustration of any reasonable expectation interest. See pp. 7-9, *supra*, and Pet. App. 20a. The decision on appeal in *Florida Power*, in which appeal no one has called into question this Court's decision in *Thompson*, will have no impact upon this petition for certiorari unless this Court is disposed to call into question *Thompson* and the entire line of precedent associated with it. Petitioners allege that if *Thompson* is applicable, then it is in conflict with the statement in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893), that "the ascertainment of [just compensation] is a judicial injury," and that "certiorari should be granted to settle that conflict" (Pet. 15-16). That contention will not stand scrutiny, as there is no conflict between the

3. The Compensation Awarded In This Case Is Constitutionally Adequate.

Petitioners' argument that the rate-making standard of Section 402(a) of the RPSA as applied by the ICC is "unfair" and hence contrary to the Fifth Amendment (Pet. App. 16-27) is noticeably silent in demonstrating any conflict between the decision below and decisions of other circuits or the decisions of this Court.[9]

Judge Oakes, in his opinion below, aptly disposed of Petitioners' contentions when he said:

> The second reason that Metro's argument here fails is that, assuming arguendo that there has been a taking, compensation is adequate since MTA, in obtaining avoidable costs, will receive what it would have had but for the taking. *Cf. Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665, 668 (7th Cir. 1982). In other words, the owner, here the lessee, of the railroad facilities will

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general statement in *Monongahela* and the principle expressed in *Thompson* that in matters involving regulation which has been delegated to a regulatory agency, the agency may determine compensation in the first instance, subject to review by the courts to make sure that constitutional rights have been protected.

[9] Petitioners' general lament, throughout their petition, that they have been treated "unfairly" by the Congress, the ICC and the federal courts is further belied by the fact, shown on the record below, that between 1965 and September 30, 1983, the U.S. Urban Mass Transit Administration ("UMTA") made capital grants of over $1.6 billion to the New York metropolitan region's commuter railroads. Most of such grants went to MTA's rail subsidiaries, Metro-North and the Long Island Railroad. The federal government provided another $59 million to Metro-North for transition costs when it commenced commuter rail operations in 1983. UMTA operating subsidiaries to MTA in 1984 were $24.4 million. These grants were in addition to the other federal programs designed to preserve essential rail transportation service in the New York area, programs such as Conrail (see note 1, *supra*) and even Amtrak itself.

> be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation. *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961). Perhaps the whole taking argument can be dismissed with the comment that MTA and Metro-North really wish to seek to have Amtrak share with them the overhead costs of 'ownership.' If the Fifth Amendment required such a sharing, they would be put in a better position by Amtrak's appearance on the scene. True, Amtrak benefits. But if we know one immutable principle in the law of just compensation, it is that value to the taker is not to be considered; only loss to the owner is to be valued. *United States v. Miller*, 317 U.S. 369, 375 (1943).

(Pet. App. 20a-21a)

Petitioners concede that under the avoidable costing approach ordered by the ICC they will be in the same position monetarily as they would be if Amtrak had not appeared and make no attempt to demonstrate why the above-quoted reasoning and authorities cited by the court of appeals might be inapplicable. Although, as Judge Oakes noted, they have no constitutional right to be placed "in a better position by Amtrak's appearance on the scene," the ICC order about which they complain afforded Petitioners the opportunity annually to earn incentive payments estimated at up to $1.2 million in addition to their $800,000 in out-of-pocket costs. Thus, Petitioners are in the untenable position of complaining about being placed in a better position than they would be entitled to under the law of just compensation.

CONCLUSION

Further review by this Court is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY AND METRO-NORTH COMMUTER RAILROAD COMPANY, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the order of the Interstate Commerce Commission establishing compensation for the use of petitioners' tracks and facilities by respondent National Railroad Passenger Corporation (Amtrak) for the operation of passenger trains constitutes a "taking" of petitioners' property within the meaning of the Fifth Amendment.

2. Whether Congress constitutionally may provide for the Commission, rather than a court, to establish in the first instance the compensation payable by Amtrak for the use of petitioners' tracks and facilities.

3. Whether the Commission's order, which provides for Amtrak to pay petitioners for all incremental costs attributable to Amtrak's operations plus an additional amount based on the quality of service, furnishes a constitutionally adequate level of compensation.

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JURISDICTION

The judgment of the court of appeals was entered on June 4, 1986, and the petition for a writ of certiorari was filed on September 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Rail Passenger Service Act of 1970 (RPSA), 84 Stat. 1327, 45 U.S.C. 501 *et seq.*, in response to the rapid deterioration of intercity rail passenger

service. The Act authorized the creation of National Railroad Passenger Corporation (Amtrak) and provided for the assumption by Amtrak of the intercity passenger service obligations of nearly all of the Nation's railroads. *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry. Co.*, 470 U.S. 451, 454-456 (1985); *Congress of Railway Unions* v. *Hodgson*, 326 F. Supp. 68, 70 (D.D.C. 1971).

Under Section 402(a) of RPSA, 45 U.S.C. 562(a), Amtrak may contract with "railroads" (such as petitioner Metro-North Commuter Railroad Company) and with "regional transportation agencies" (such as petitioner Metropolitan Transportation Authority (MTA)) for the "use of tracks and other facilities" necessary for Amtrak to provide intercity rail passenger service. If the parties cannot agree to the terms for that use, the Interstate Commerce Commission may order the railroad or regional transportation agency to permit Amtrak to use the facilities in return for "just and reasonable" compensation. Section 402(a) provides that in fixing "the amount (if any)" of "compensation in excess of incremental costs," the Commission shall "consider quality of service as a major factor." "Incremental costs," the parties agree, are limited to "avoidable" costs, which are those that would be incurred if the services of Amtrak were eliminated. See Pet. App. 5a-6a, 50a; H.R. Rep. 415, 93d Cong., 1st Sess. 6, 11 (1973).

2. This case is an action for judicial review of the Commission's order under Section 402(a) of RPSA establishing the compensation payable by Amtrak to petitioners for Amtrak's use of tracks and other facilities on the Harlem-Hudson Line, which runs between Poughkeepsie and Grand Central Terminal in New York.

a. Before the passage of RPSA, Penn Central Transportation Company was the owner of the Harlem-Hudson Line and conducted freight, intercity passenger,

and commuter service over the Line. In April 1971, Amtrak assumed Penn Central's obligations to conduct intercity passenger service, and Penn Central thereafter operated intercity passenger trains over the Harlem-Hudson Line for Amtrak's account. On June 1, 1972, Penn Central leased the Harlem-Hudson Line to petitioner MTA for 60 years (with renewal options for an additional 30 years) at a nominal charge. The lease agreement reserved to Penn Central all rights necessary for the operation of its own freight trains and Amtrak's passenger trains over the Line (subject to a trackage charge if the operations exceeded stated levels). The agreement also had the effect of making MTA eligible for substantial federal aid. See 49 U.S.C. App. 1602(a). A second agreement entered into on June 1, 1972 provided for Penn Central to operate commuter rail service over the Harlem-Hudson Line for MTA's account. Pet. App. 6a-7a, 28a; *Consolidated Rail Corp.* v. *Metro-North Commuter R.R. Co.*, 598 F.Supp. 1571, 1575-1576 (Regional Rail Reorg. Ct. 1984) (hereinafter cited as *Conrail*).

b. On April 1, 1976, pursuant to the Final System Plan prepared under the Regional Rail Reorganization Act of 1973[1] and approved by Congress (see 45 U.S.C. 718(d)(1)), the bulk of Penn Central's railroad assets, including its trackage rights over the Harlem-Hudson Line and its responsibility for providing commuter rail service on the Line, were assigned to Consolidated Rail Corporation (Conrail). Also on April 1, 1976, pursuant to the same statute, Conrail assigned to Amtrak certain long-haul passenger train trackage rights in the Northeast Corridor, but that assignment did not include Conrail's trackage rights over the Harlem-Hudson Line, because the Line is not in the Northeast Corridor. Conrail, not Amtrak,

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[1] 87 Stat. 985, 45 U.S.C. 701 *et seq.*; see *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 111-115 (1974).

therefore continued to hold the trackage rights over the Line that Penn Central had reserved when it leased the Line to MTA. Accordingly, in order to enable Amtrak to continue to furnish intercity passenger service over the Line, Amtrak entered into an agreement with Conrail under which Conrail made the tracks and facilities available and operated Amtrak's trains over the Line for Amtrak's account, just as Penn Central had previously done. Pet. App. 7a-8a, 28a-29a; *Conrail*, 598 F. Supp. at 1576-1577. Conrail also provided commuter service over the Line for MTA's account, just as Penn Central had previously done.

c. In the Northeast Rail Service Act of 1981 (NRSA), Pub. L. No. 97-35, tit. XI, 95 Stat. 643 *et seq.*, Congress provided for the transfer of Conrail's commuter rail service responsibilities to entities whose principal purpose is the provision of commuter services. See 45 U.S.C. 1102(2). MTA organized a subsidiary, petitioner Metro-North, to furnish commuter services over the Harlem-Hudson Line. Metro-North commenced operations on January 1, 1983, and Conrail ceased to operate commuter services for MTA on that date. Pet. App. 8a; 45 U.S.C. 744a; *Conrail*, 598 F. Supp. at 1577-1578.

3.a. Because Conrail was no longer to be the railroad with operating responsibilities on the Harlem-Hudson Line after January 1, 1983, Amtrak sought to enter into an agreement with petitioners for the use of the Line after that date. When the parties could not reach agreement, Amtrak requested the Interstate Commerce Commission to set the compensation pursuant to Section 402(a) of RPSA.[2] The Commission first rejected petitioners' con-

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[2] Conrail previously had filed an action in the Special Court established by Section 209(b) of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 719(b), seeking a declaration that the essentially free trackage rights over the Harlem-Hudson and the New Haven Lines that were reserved to Penn Central under the 1972 lease agreement

tention that Section 402(a) violates the Fifth Amendment because it (i) results in a taking of petitioners' property by permitting Amtrak to use their tracks and other facilities and (ii) assigns to the Commission in the first instance, rather than the courts, the responsibility for setting the compensation to be paid by Amtrak. In the Commission's view, it was not clear that Section 402(a) effects a taking, "since Metro-North still has a right (albeit nonexclusive) to use its property" (Pet. App. 40a). But the Commission found petitioners' argument to be without merit in any event, because the courts have sustained the power of Congress to assign to an administrative tribunal the responsibility for ascertaining just compensation (*id.* at 40a-41a).[3]

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with petitioner MTA were still valid, even though Conrail had ceased operating commuter rail services effective January 1, 1983. Amtrak intervened in those proceedings, seeking a declaration that its similar trackage rights over the New Haven Line were still valid. The Special Court held that both Conrail and Amtrak retained those trackage rights. *Conrail*, 598 F. Supp. at 1582. That decision did not apply to Amtrak's service on the Harlem-Hudson Line, because it is not in the Northeast Corridor and Amtrak was not assigned any rights on it by Conrail in 1976. Pet. App. 9a, 29a, 36a.

After Amtrak requested the Commission to set the compensation for use of the Harlem-Hudson Line, petitioners filed a motion in the Special Court to enjoin the Commission proceedings. Petitioners argued that Section 402(a) does not apply to Amtrak's use of their facilities and that Section 402(a) is unconstitutional if it does so apply. The Special Court denied petitioners' motion, concluding that the Commission had jurisdiction under Section 402(a) and that petitioners' constitutional objection was not substantial in light of *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134, 147-148 (1946). See Pet. App. 137a-141a. In the instant case, the Commission and the court of appeals likewise rejected petitioners' argument that Section 402(a) is inapplicable (Pet. App. 12a-17a, 30a-33a, 37a-40a), and petitioners do not challenge that holding here (see Pet. 10).

[3] The Commission also rejected petitioners' contention that the application of Section 402(a) is unconstitutional under the Tenth Amendment and this Court's decision in *National League of Cities* v.

The Commission then ordered Amtrak to compensate petitioners according to the incremental cost standard in Section 402(a). See Pet. App. 45a-46a, 50a-66a. Under this standard Amtrak—which operates 18 trains per day, as compared with 102 operated by Metro-North (*id.* at 24a)—is responsible for those expenses that would not be incurred by Metro-North if Amtrak's use were eliminated (*id.* at 45a, 50a). Applying principles the Commission had previously developed to implement the incremental cost standard, the Commission allocated to Amtrak its share of expenses for the track and facilities, ticket and report clerks, refuse removal and switching at Grand Central Terminal, electricity, and liability to third parties (*id.* at 54a-66a, 68a-69a). In addition, as authorized by Section 402(a), the Commission provided for further payments by Amtrak of $2.50 per train mile based on quality of service (*id.* at 66a-67a, 71a-73a). This formula could result in additional payments to Metro-North in excess of $1 million annually. Pet. 21 n.26; Amtrak Br. in Opp. 6.

b. The court of appeals sustained the Commission's decision (Pet. App. 1a-25a), rejecting petitioner's constitutional contentions (*id.* at 17a-22a).

First, the court found no constitutional infirmity in the provision in Section 402(a) for the Commission, rather than a court, to prescribe the compensation for Amtrak's

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Usery, 426 U.S. 833 (1976). The Commission explained that "[t]he present case * * * involves a matter traditionally entrusted to the Federal government under the Commerce Clause—the use of a segment of rail line to connect an interstate passenger route"—and that Metro-North's claim of State sovereignty therefore "must give way to the interstate commerce needs of a functioning network of interstate passenger routes." Pet. App. 41a, citing *Transportation Union* v. *Long Island R.R. Co.*, 455 U.S. 678 (1982). The court of appeals, relying on the intervening decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), likewise rejected petitioners' Tenth Amendment claim (Pet. App. 22a-23a). Petitioners do not renew that claim here.

use of another railroad's facilities. Quoting Judge Friendly's observation for the Special Court when it denied petitioners' motion to enjoin the Commission proceedings (see note 2, *supra*), the court of appeals stated that this constitutional objection " 'does not appear to us to be substantial in light of *Thompson* v. *Texas Mexican Railway Co.*, 328 U.S. 134, 147-148 (1946)' " (Pet. App. 18a, quoting *id.* at 139a-140a). In *Texas Mexican Ry.*, the Court held that the Commission had jurisdiction to establish the terms and conditions for trackage rights, and in the court of appeals' view that case "unquestionably stands for the proposition that the delegation of power to the ICC to set trackage rates, subject to ultimate judicial review, is constitutional" (Pet. App. 19a).

Second, the court of appeals rejected the contention that an order to make facilities available under Section 402(a) results in a "taking" of property (Pet. App. 19a-20a). The court initially noted "the irony of a transit authority that obtains a sixty-plus year lease of railroad property at a nominal rate and that, as a result of that lease, receives substantial aid from the federal government claiming that a federal agency is taking its leased property improperly because the compensation the authority receives is limited to avoidable costs" (*id.* at 19a). In any event, the court observed that since *Munn* v. *Illinois*, 94 U.S. 113 (1876), railroads have been subject to reasonable regulation, and that in this case, "requiring one public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement, in order to deliver service to the public * * * fits more into the regulatory rather than the taking mode" (Pet. App. 19a-20a). In holding that the rate regulation in this case does not impermissibly interfere with petitioners' " 'investment backed expectations' " (*id.* at 20a, quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979)), the

court found it "hard to imagine that when MTA, a public authority, leased the Harlem-Hudson Line at a minimal investment it had any expectation that it could preclude its lessor or those holding rights reserved by the lessor from exercising the reserved trackage rights" (*id.* at 20a).

Third, the court held that reimbursement of avoidable costs satisfies the requirements of the Fifth Amendment even if an order granting trackage rights under Section 402(a) does result in a "taking" of property. The court explained that if MTA receives reimbursement for its avoidable costs, it "will be put in the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation." Pet. App. 20a.[4]

ARGUMENT

The court of appeals correctly rejected petitioners' constitutional challenge to the Interstate Commerce Commission's order establishing compensation for Amtrak's use of the Harlem-Hudson Line on the basis of incremental costs and quality of service. Petitioners leased the Line, subject to reserved rights in Penn Central to run its own freight trains and Amtrak's passenger trains, after Congress enacted Section 402(a) of RPSA, and they therefore had no reasonable investment-backed expectation that they would receive reimbursement under some other formula. Moreover, petitioners lease the Line for a nominal charge and operate commuter services with substantial aid from the Federal Government. There accordingly is no merit to petitioners' contention that their property was unconstitutionally taken by the Commission's order, which leaves them in no worse position—and perhaps in a better posi-

[4] The court of appeals also rejected several non-constitutional challenges by petitioners to the Commission's calculation of the compensation owed by Amtrak (Pet. App. 23a-25a). Petitioners do not renew those challenges here.

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tion—than if Amtrak were not using the Line. The court of appeals' holding is consistent with this Court's decisions regarding the Commission's powers and the nature of trackage rights, and it presents no issue of general importance warranting review by this Court.

1. The central premise of petitioners' submission is that the Commission's order under Section 402(a) results in a "taking" of their property within the meaning of the Fifth Amendment. The court of appeals correctly rejected that contention.

a. Regulation obliging a railroad to make its facilities available for transportation use at reasonable rates does not constitute a "taking." Since *Munn* v. *Illinois*, 94 U.S. 113 (1876), it has been settled that businesses such as railroads are subject to reasonable governmental regulation. The Court stated in *Munn* that "when private property is devoted to a public use, it is subject to public regulation" (*id.* at 130), and that "[s]tatutes regulating the use, or even the price of the use, of private property [do not deprive] an owner of his property without due process of law" (*id.* at 125). Such governmental regulation "may, consistently with the Constitution, limit stringently the return recovered on investment" (*Permian Basin Area Rate Cases*), 390 U.S. 747, 769 (1968)), and such regulation is consistent with the Fifth Amendment if the rates are not confiscatory (*id.* at 770; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 49 (1936)). Petitioners do not and could not contend that the compensation payable by Amtrak under Section 402(a) is confiscatory, because Amtrak is responsible for all costs attributable to its operations.[5]

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[5] Moreover, as petitioners concede (Pet. 13-14 n.14), in addition to the compensation payable under the special formula for calculating the incremental cost to petitioners resulting from Amtrak's use of the tracks (the Speed Factored Gross Ton Miles Formula), Amtrak also agreed to contribute $6 million to the rehabilitation of a portion of the Line. Pet. App. 12a, 57a.

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b. Petitioners nevertheless argue (Pet. 12, 14-15) that Section 402(a) results in a taking because the Commission's order confers upon Amtrak the right to "physically occupy" petitioners' property against their wishes and therefore is indistinguishable from an ordinary exercise of the power of eminent domain. But a common carrier is traditionally obliged by regulation to accept the physical presence of other people and their assets on its property for purposes of transportation. While such regulation could be characterized as permitting a physical invasion of the common carrier's property, it does not follow that every such regulatory measure is a taking, importing into the ratemaking context the quite distinct doctrine and rules of compensation developed under the Court's Fifth Amendment takings cases.

In particular, this Court repeatedly has described the use by one railroad of the tracks and facilities of another in return for a reasonable charge not as a "taking" or acquisition of an interest in property, but as the shared use of property that has been devoted to serving the public interest[6] and therefore as a proper subject of governmental regulation. For example, in *Texas Mexican Ry.*, the Court stressed that a trackage agreement over another railroad's line "created only a personal obligation and did not purport to grant * * * any estate in the property of [the owner]" (328 U.S. at 140). Similarly, in *Union Pacific Ry.* v. *Chicago, R.I. & P. Ry.*, 163 U.S. 564 (1896), the Court stressed that railroad lines traditionally have been "regarded and treated as public highways for the use of all who ha[ve] occasion to run their vehicles thereon" (*id.* at 585), and that a railroad having trackage rights over such a line "had no possession before its trains came on the tracks or after they had run off them; and while its trains were on

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[6] See *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 479 (1924); *Penn-Central Merger Cases*, 389 U.S. 486, 510-511 (1968).

the track, its possession was only of the particular part occupied temporarily while running over them" (*id.* at 582). Such a transitory use of a particular segment of track as a train passes over it is far different from the sort of physical occupation of property that could form the basis for a taking claim. The Commission's order in this case does not, for example, grant Amtrak an interest in or control over any of petitioners' facilities or prevent petitioners from exercising such control or using the tracks. The order simply enables Amtrak to use the facilities in the manner in which common carriers typically use the highways of commerce that are dedicated to public service.

Nor does the Commission's order in this case represent a novel exercise of regulatory power. More than fifty years ago, the Court recognized the exclusive jurisdiction of the Commission, under the Transportation Act of 1920, over the terms and conditions of trackage rights agreements. The court noted that the "enormous sums" required for investment in separate rail lines had caused or threatened financial ruin to many railroads and that the "[n]eed for effective regulation in this field had become urgent" (*Transit Commission* v. *United States*, 289 U.S. 121, 127 (1933)). Similarly, in *Pennsylvania Co.* v. *United States*, 236 U.S. 351, 369-372 (1915), the Court held that a Commission order requiring a railroad to receive and transport the cars of another carrier was not a taking of the railroad's property without compensation, in violation of the Fifth Amendment.[7]

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[7] By contrast, *Lehigh & N.E. Ry.* v. *ICC*, 540 F.2d 71, 81-84 (3d Cir. 1976), cert. denied, 429 U.S. 1061 (1977), upon which petitioners rely, involved the actual possession by one railroad of the line of another; yet even in that circumstance, the court found no taking. See also *Gibbons* v. *United States*, 660 F.2d 225, 229 (7th Cir. 1981); *Gibbons* v. *United States*, 660 F.2d 1227, 1238-1239 (7th Cir. 1981).

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c. The distinction between the sort of transitory use of rail facilities at issue here and a concrete, lasting, and exclusive occupation of property that could give rise to a taking claim is reflected in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, the Court repeatedly stressed that the cable television company's attachment of its equipment to an apartment house resulted in a "permanent physical occupation" of the premises. 458 U.S. at 426, 427, 430, 432, 434, 437, 441. By contrast, Amtrak's operation of trains over the Harlem-Hudson Line results in what the Court in *Loretto* characterized as a "temporary invasion," which does not constitute a taking per se but instead is subject to a balancing test. 458 U.S. at 428, 432-433 n.9, 434; see pages 13-15, *infra*.

This distinction was underscored in *Lorretto* by the Court's quotation of a passage from *St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92 (1893), that contrasted a telegraph company's placement of poles on a street with the typical use of the street for transit (458 U.S. at 428-429, quoting 148 U.S. at 98-99 (emphasis omitted)):

> "The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. . . . But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground."

In this case, Amstrak's nonexclusive right to run trains over the Line gives it no "permanent and exclusive" presence that "dispossesses" petitioners or others who operate over the tracks; it makes only a "temporary and

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shifting" use of the Line, and "[t]he space [it] occupies one moment [it] abandons the next to be occupied by any other [operator]."

Nor does Amtrak's use interfere with any right of petitioners to exclude others from their premises, a factor the Court also found significant in *Loretto*. See 458 U.S. at 433, quoting *Kaiser Aetna*, 444 U.S. at 176, 180. Unlike the private apartment building in *Loretto,* the tracks and related facilities of a railroad are devoted to public service, which includes the obligation to admit others to their use in return for reasonable compensation. Cf. *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 82-85 (1980). The absence of any such right to exclude is especially vivid in this case, because the 1972 agreement by which Penn Central leased the tracks to petitioner had expressly reserved trackage rights for Penn Central and Amtrak.

d. The conclusion that the Commission's order does not result in a taking of property is reinforced by a consideration of the three factors upon which this Court has principally relied in determining whether a regulatory measure results in a taking. Those factors are the "character of the governmental action," the "economic impact of the regulation on the claimant," and the "extent to which the regulation has interfered with distinct investment-backed expectations." See, *e.g.*, *Connolly* v. *PBGC*, No. 84-1555 (Feb. 26, 1986), slip op. 13; *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

First, the governmental action is the traditional one of regulating the terms and conditions of trackage arrangements. Such adjustment of the benefits and burdens of economic life to promote the common good does not generally constitute a taking requiring the payment of compensation. *Connolly*, slip op. 13; *Penn Central*, 438 U.S. at 124. Moreover, the provision in Section 402(a) for Amtrak to use the facilities of other railroads on the basis

of incremental costs and quality of service is but one aspect of far broader initiatives supported by the Federal Government to rehabilitate intercity passenger service throughout the Nation and rail service generally in the Northeast region. Other features of the resulting arrangement enabled MTA to obtain a long-term lease of the Harlem-Hudson Line for only a nominal charge and, as petitioners concede (Pet. 27 n.33), to receive significant financial assistance from the Federal Government to rehabilitate and operate trains over that and other lines. See Amtrak Br. in Opp. at 12 n.9 (itemizing federal financial assistance to MTA for capital improvements ($1.6 billion), transition costs ($59 million), and operating expenses ($24.4 million in 1984)). Compare *Penn Central*, 438 U.S. at 137; *Connolly*, slip op. 13-14. Finally, to the extent that the issue is ultimately one of fairness, it should be noted that Amtrak's furnishing of intercity passenger service over the Line accrues to the advantage of the commuters and taxpayers in New York who contribute to petitioners' expenses (see Pet. 27 n.33) and who therefore ultimately would benefit from any increased contribution to those expenses by Amtrak. Compare *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

Second, with respect to adverse economic impact, petitioners incur no out-of-pocket costs by virtue of the Commission's order, because Section 402(a) requires that they be reimbursed for incremental costs attributable to Amtrak's use of the facilities. In fact, petitioners stand to benefit from Amtrak's presence and the Commission's order, because petitioners also are eligible to receive quality-of-service payments in excess of $1 million annually.

Third, the Commission's order does not interfere with any reasonable investment-backed expectation of petitioners. Prior to the time that MTA leased the Harlem-Hudson Line from Penn Central, Congress, in Section

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402(a) of RPSA, had authorized the Commission to order a railroad or regional transportation agency to make tracks and other facilities available to Amtrak on the basis of incremental costs and quality of service. That statutory provision removes any claim by petitioners that the application of Section 402(a) to the Harlem-Hudson Line upset MTA's reasonable expectations. Compare *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1005-1008; *Bowen* v. *Agencies Opposed to Social Security Entrapment*, No. 85-521 (June 19, 1986), slip op. 10-13; *Connolly*, slip op. 15. Moreover, quite aside from Section 402(a), the 1972 lease agreement preserved as a *contractual* matter the right of Penn Central and Amtrak to operate trains over the Line without a trackage charge, which further undermines any claim that MTA expected that it would have a right to exclude Amtrak from the Line. Compare *Kaiser Aetna*, 444 U.S. at 179-180. Nor were any such expectations MTA might have had "investment-backed" to any significant extent, because MTA leased the Line for a nominal charge. And because Amtrak (like Penn Central and Conrail) then operated trains over the Line for the next decade, petitioner Metro-North could have had no contrary expectations when it took over commuter services in 1983.

e. In sum, " 'justice and fairness' "[8] clearly do not require that petitioners receive monetary contributions from Amtrak in excess of incremental costs and quality-of-service payments. The Commission's order in this case therefore does not result in a taking of property. Because petitioners' entire submission rests on the threshold premise that the Commission's order *does* effect a taking (see Pet. 15, 17), the petition for a writ of certiorari should be denied.

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[8] See *Kaiser Aetna*, 444 U.S. at 175, quoting *Penn Central*, 438 U.S. at 124.

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2. Petitioners present two other questions for review, neither of which need be reached if, as we submit above, the Commission's order did not effect a taking of property.

a. First, relying on the statement in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1938), that "the ascertainment of [just compensation] is a judicial inquiry," petitioners argue (Pet. 15-16) that Congress could not constitutionally assign to the Commission, rather than the courts, the authority to set compensation in the first instance. This contention is without merit. *Monongahela* establishes only that a court is not bound by a congressional attempt to limit the scope of the judicial inquiry; it does not require that an administrative body be altogether excluded from the process of determining just compensation. As the Court explained in the *Regional Rail Reorganization Act Cases*, 419 U.S. at 151 n.39, "*Monongahela* did no more than restate the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands."

It follows, contrary to petitioners' contention (Pet. 16), that the Court's subsequent decision in *Texas Mexican Ry.* is fully consistent with *Monongahela.* In *Texas Mexican Ry.*, the Court held that the Interstate Commerce Act "vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. The jurisdiction of the Commission is exclusive." 328 U.S. at 147. In so holding, the Court stressed that "[a]ny legal, including constitutional, rights of [the claimant] are protected by the review which Congress has granted the orders of the Commission" (*id.* at 150). As both the court of appeals and the Special Court concluded (Pet. App. 18a, 139a-140a), petitioners' contention that the Commission is constitutionally barred from determining the compensation due in the specific context of trackage rights, subject to judicial review, cannot be

squared with *Texas Mexican Ry.* Moreover, this Court has repeatedly made clear in other contexts that the ascertainment of just compensation need not be assigned to a court in the first instance. See, *e.g.*, *Bauman* v. *Ross*, 167 U.S. 548, 593 (1897); *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 125 (1950); *United States* v. *Jones*, 109 U.S. 513, 519 (1883).[9]

The court of appeals adhered to the principles of *Monongahela* and *Texas Mexican Ry.* in this case. The court did not give binding effect to a decision of either Congress or the Commission with respect to the amount of compensation due. In addition, petitioners were given a full and fair opportunity to present evidence before the Commission and to raise on judicial review their claims concerning the constitutional adequacy of the compensation. The court of appeals simply rejected petitioners' constitutional objections on the merits.[10]

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[9] The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." This language does not prescribe any particular means by which just compensation must be determined. Petitioners' reliance (Pet. 15) on *Crowell* v. *Benson*, 285 U.S. 22 (1932), and *United States* v. *Raddatz*, 447 U.S. 667 (1980), is misplaced. The Court recognized in *Raddatz* that the holding in *Crowell* was "substantially cut back" by its author, Chief Justice Hughes, in *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936). See 447 U.S. at 683. In *St. Joseph Stock Yards*, the Court made clear that "th[e] judicial duty to exercise an independent judgment does not require or justify disregard of" the ~~original~~ agency determination, but rather "~~may but~~ may be informed and aided by the sifting procedures of an expert legislative agency." See also *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 16-23; *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 69-70 (1982) (opinion of Brennan, J.).

[10] Petitioners do not rely on the Eleventh Circuit's decision in *Florida Power Corp.* v. *FCC*, 772 F. 2d 1537 (1985), which is pending before this Court on direct appeal (No. 85-1658) and is scheduled for oral argument on December 3, 1986. In *Florida Power*, the Eleventh Circuit held unconstitutional the authorization of the Federal Com-

b. Finally, petitioners contend (Pet. 16-27) that the compensation ordered by the Commission was constitutionally inadequate because it was based on avoidable costs. Particularly in the unique circumstances of the Harlem-Hudson Line, that question would not warrant review by this Court even if Amtrak's use of petitioners' facilities did amount to a taking.

At least in these circumstances, compensation based on avoidable costs is constitutionally adequate because petitioners are thereby put in the same position they would have occupied absent the supposed "taking." See *Chicago & N.W. Transportation Co.* v. *United States*, 678 F.2d 665, 669 (7th Cir. 1982). As the court of appeals observed, under *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970),

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munication Commission, in the Pole Attachments Act, 47 U.S.C. 224, to determine the rates a cable television operator must pay to a public utility that has permitted the operator to attach its cables to the latter's utility poles.

There is no occasion to hold the petition in this case pending the Court's decision in *Florida Power*. The Eleventh Circuit's decision was premised on that court's threshold conclusion that there was a "taking" of property, in light of what the court found to be a "permanent physical occupation" within the meaning of *Loretto*. See 772 F.2d at 1542-1544. Here, by contrast, the court of appeals held that there was *not* a taking. For the reasons stated above (see pages 9-15, *supra*), that holding is clearly correct, because Amtrak's use of petitioners' facilities does not resemble the "permanent physical occupation" in *Loretto*, and that holding below does not warrant review by this Court. Accordingly, there is no occasion in this case to reach the additional question presented by *Florida Power*: whether, if there is a taking, an administrative agency may determine the just compensation due, subject to judicial review. This case is in any event distinguishable from *Florida Power* on the latter issue, in view of the holding in *Texas Mexican Ry.* (which is not challenged in *Florida Power*) that the Interstate Commerce Commission has the authority to establish the terms and conditions for the very type of arrangement at issue here – the exercise of trackage rights – and that the track owner's constitutional rights are fully protected by the opportunity for judicial review.

and *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961), "this is precisely the guiding principle of what is just compensation" (Pet. App. 20a-21a).

Petitioners nevertheless assert, without authority, that the statutory incremental cost standard is "palpably unfair" (Pet. 17), and that Amtrak should be forced to bear a portion of the costs that petitioners would incur in operating the Line even in the absence of Amtrak. The court of appeals correctly rejected this contention, stating (Pet. App. 21a):

> Perhaps the whole taking argument can be dismissed with the comment that MTA and Metro-North really wish to seek to have Amtrak share with them the overhead costs of "ownership." If the Fifth Amendment required such a sharing, they would be put in a better position by Amtrak's appearance on the scene. True, Amtrak benefits. But if we know one immutable principle in the law of just compensation it is that value to the taker is not to be considered; only loss to the owner is to be valued. *United States* v. *Miller*, 317 U.S. 369, 375 (1943).

Petitioners concede (Pet. 19) that *United States* v. *Miller*, relied upon by the court of appeals, correctly states the general rule. But they seek an exception to that rule, because they believe it is "unfair" in this context. See Pet. 19-23, 27. Contrary to petitioners' contention, the Constitution does not inflexibly require Congress or an agency to base reimbursement for use of facilities or services on fully distributed rather than incremental costs, as long as the railroad experiences no net loss or other "economic injury" (*Kaiser Aetna*, 444 U.S. at 175). Compare *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. at 476-478.[11]

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[11] Petitioners contend that a more flexible test of just compensation is appropriate when necessary to prevent " 'manifest injustice to

Whatever might be the merits of such a claim in another setting, moreover, petitioners' argument for an exception to the usual rule of just compensation is completely without merit here. Because MTA made only a minimal investment when it leased the Line, petitioners' assertion (Pet. 26) that Amtrak should pay more than its incremental costs in order to prevent a "free ride" by Amtrak and to enable petitioners to realize a return on their investment rings particularly hollow. Furthermore, petitioners in fact have the opportunity to realize more than $1 million annually in excess of incremental costs (a bonus of more than 100%) based on quality of service. Even assuming that "justice and fairness" might require some element of compensation over and above incremental costs, petitioners have not shown that the quality-of-service formula is a constitutionally impermissible basis on which to measure that element. Finally, the notion of what compensation is "just" in the present circumstances cannot ignore other considerations, including the substantial federal aid to MTA and its Metro-North subsidiary. Surely, it is a fair condition to this aid that petitioners make their tracks and other facilities available to Amtrak, which also receives considerable financial assistance from the Federal Treasury, in return for reimbursement based on incremental costs and quality of service.

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owner or public' " (Pet. 19, quoting *United States* v. *Commodities Trading Corp.*, 339 U.S. at 123). However, *Commodities Trading* does not support petitioners' contention that equitable considerations require an increase in compensation here. In *Commodities Trading*, the War Department requisitioned a commodity for which a ceiling price had been established under the Emergency Price Control Act. The Court held that just compensation should be measured by the ceiling price set by regulation, rather than the higher market value that would have existed in the absence of regulation. The claimant's business, like MTA's, was regulated, and it accordingly could expect only the return available under the regulated price.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 86-409

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OCTOBER TERM, 1986

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Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents,* and NATIONAL RAILROAD PASSENGER CORP., *Intervenor.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners argued in the Court of Appeals that the use of avoidable costing as a methodology for computing the compensation due them in a taking setting violates those constitutional principles of equity and fairness that have traditionally governed proceedings in eminent domain because its inevitable assignment of dominant user status to Petitioners denies them any significant contribution toward the costs they incur in operating the Hudson Line. See "The Essential Unfairness of Avoidable Costing," Petition, at 16-23.[1] Respondents claim that the Court of Appeals'

[1]The principal issue in this case is the constitutionality of applying avoidable costing principles in a taking setting. Respondents' claim that no taking has occurred is untenable. The just compensation clause

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rejection of this argument is not in conflict with the decisions of other circuits which have considered the issue. They are wrong; the Third Circuit, whose views were urged upon the Court of Appeals by Petitioners, disagrees. The case was *Southeastern Pennsylvania Transp. Auth. v. ICC*, 644 F.2d 238 (3rd Cir. 1981), herein referred to as *SEPTA*, the holding of which was distinguished below as being "based on [the Third Circuit's] view of the legislative intent behind the [Rail Act] and the [Final System Plan developed under that Act], not on its view of constitutional dictates." Petitioners' Appendix, at 21a. That distinction loses its force, however, once it is appreciated that the question before the Third Circuit was in large part the very same question which is

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cannot be repealed by characterizing the nature of a governmentally-compelled occupancy of private property as the impressing of a trackage right, rather than an easement, over land. Whichever device is employed, it relieves the beneficiary of the status of a trespasser for the agreed-upon term (here indefinitely). Moreover, although we dispute its relevancy, the fact is that Amtrak has been given substantial occupancy, not just a right-of-passage, in this case. It shares the use of a great railroad terminal, selling its tickets and reservations, embarking and disembarking its passengers and occupying prime terminal berths with its trains for hours and days at a time. The Government's incredible claim that the occupancy is transitory flies in the face of reality. It has gone on for almost sixteen years and Amtrak would be the first to admit that it will almost certainly continue for many years to come. No precedent in this Court holds that the regulated railroad industry has so far lost the protection of the Fifth Amendment as to permit Congress to requisition the property and personnel of individual railroads for its favored beneficiary in the guise of trackage rights regulation. None of the cases cited by Respondents so holds; indeed, none of them involves factual circumstances which give even the appearance of a taking. (The closest case, *Pennsylvania Co. v. United States*, 236 U.S. 351 (1915), was resolved not by compelling a railroad to receive the trains of another but by telling it that it could not discriminate in the acceptance of trains from other railroads.) The ruling below that a taking has not occurred in the circumstances of this case is truly unprecedented. Respondents are correct when they argue that *Loretto v. Teleprompter*, 458 U.S. 419 (1982), and *FCC v. Florida Power Corp.*, No. 85-1658 (Argued December 3, 1986), are not in point. Those cases involve mere technical trespasses compared to the full-scale requisitioning of plant and personnel present

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posed by this case: whether it was equitable and fair for the Commission to employ an avoidable-costing methodology to compel the owner of a jointly-used line of railroad to absorb the common costs arising out of its operation.

In *SEPTA* the precise issue was whether the governing statutes enacted by Congress authorized the Commission to employ an avoidable-costing methodology, with its built-in requirement for the identification of a dominant user, in determining the subsidy payable to Conrail for operating a local authority's commuter trains. The line over which the trains operated, originally owned by Conrail, was also used by Conrail's freight trains. When the authority purchased the line from Conrail in 1979, the Commission was asked whether that transfer, under which Conrail reserved trackage rights to continue its freight operations, affected the statutory subsidy payable to Conrail for operating the commuter service. The Commission's response was that the subsidy had to be increased. It held that the governing statutes contemplated the use of an avoidable costing methodology in determining the subsidy payable where the use of a line is shared, and that for the purposes of that methodology the authority was not only a joint user of the line, through Conrail's operation of the authority's commuter trains, but its dominant user as well, because under the Commission's regulations the mere fact of ownership raised a conclusive presumption of dominance. The consequence of that decision, of course, was to saddle the authority's commuter service with the line's common costs for so long as the authority chose to have Conrail operate that service.[2]

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in this case. If the FCC had ordered Florida Power to make available to the cable television company twenty percent of the transmission capacity of Florida's own power lines, that case would be closer to this.

[2]That consequence was not as drastic as in the instant case because the Commission first divided common costs into two categories, variable (costs the amounts of which are determined by the extent of usage, as in the case of the replacement of worn track) and fixed (costs the amount of which are determined without regard to the extent of usage, as in the case of damage from a storm), and it then ignored its own avoidability rules and proceeded to apportion the variable common costs between the two services, freight and commuter, on the basis of various usage for-

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SEPTA involved no constitutional issue. Congress, Conrail's owner, could validly condition the furnishing of Conrail's services in the operation of the authority's commuter trains in any way that Congress saw fit. The sole question was whether its particular statutory delegations to the Commission of the power to prescribe the subsidy payable for Conrail's services permitted the Commission to engage in avoidable costing where Conrail's freight service shared the use of a line, and, if they did so permit, whether they sanctioned the assignment of the all-important status of dominant user on the basis of ownership alone. But those statutory delegations, in the circumstances of that case, turned out to require the calculation of a subsidy based upon the very same standards which the Constitution makes applicable in calculating the compensation due upon a taking in eminent domain, the standards of fairness and equity. Thus, the Third Circuit held that while the delegating statutes used language which could validly "support contradictory inferences" regarding the costing principles to be employed in calculating the subsidy, they nevertheless reflected "one paramount legislative concern," and "that was that costs should be allocated according to principles of fairness and equity." *Id.*, at 251-252. The court then proceeded to hold that the assignment of dominant status under an avoidable-

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mulas (*id.*, at 251) which were acceptable to both the commuter authority and Conrail. It was the burden of fixed common costs, as to which no allocation was permitted, against which the commuter authority rebelled. In the instant case the Commission has compelled Petitioners to absorb all common costs, fixed and variable, save for an insignificant portion of the latter category which is shared under the SFGT formula. Petition, at 20, n.23. When Respondents make the claim that Amtrak will be contributing over $800,000 a year to help defray Petitioners' costs under the Commission's decision, this Court should understand that only $182,000, a truly insignificant amount considering the amounts Petitioners must spend to run their railroad (see Petition, at 19), would be applied against Petitioners' common costs under the SFGT formula. All the rest would be in reimbursement of costs incurred at Amtrak's special request and for its sole benefit. See Petitioners' Appendix, at 43a. Those costs are not in issue before this Court. This case concerns *common* costs. In the railroad industry, if *those* costs are not shared, the owner of the line has effectively been denied compensation.

costing methodology to one user based on ownership alone, thereby saddling him with all fixed common costs, was inconsistent with principles of fairness and equity for two reasons: "[I]t may not reflect the relative use on the line by the type of service being provided, and its imposition of all of the fixed costs on the owner, irrespective of the amount of usage by another service, does not accord with notions of equitable sharing." *Id.*, at 252.

The Third Circuit left the door open for the Commission, at rehearing, to arrive at the same conclusion, that one user should absorb all fixed common costs, if it concluded upon the evidence before it that that was "the only feasible method of allocating such costs," *id.*, but the court's opinion made it clear that such a conclusion would have rough sledding if the matter came before the court again. In this regard it stated:

> We find little merit in the [Commission's][3] final justification of administrative necessity for imposition of the presumption that ownership and dominant usage are correlative. The [Commission's] entire cost methodology presupposes the feasibility of ascertaining the extent of usage. All of the common variable costs are assigned in this manner, although the measuring device for usage varies with the particular cost. There is no reason why an allocation-methodology cannot be devised with respect to fixed costs.

Id., at 251.

Moreover, the Third Circuit recognized common costs as being what they truly are, not the "overhead costs of 'ownership'" which the Second Circuit believed them to be in the instant case (Petitioners' Appendix, at 21a), but "costs which are, by definition, essential to the operation of either service without regard to whether there is another service using the same line." *Id.*, at 250.[4]

[3]The rules at issue in *SEPTA* were actually promulgated by the Rail Services Planning Office, but the Third Circuit held that that office was "sufficiently part of the [Commission]" to permit Hobbs Act review. See 49 U.S.C. §10361: "The Rail Services Planning Office is an office in the Interstate Commerce Commission."

[4]This was said, of course, of fixed common costs, because the variable common costs, having been allocated between the commuter authority

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If the instant case does indeed involve a taking, as Petitioners have claimed, and if the statutory "principles of fairness and equity" which the Third Circuit enforced in *SEPTA* are nothing less than the "ideas of fairness and equity" which are implicit in the command of the Fifth Amendment that "just compensation" be paid upon a taking, see *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950), then Petitioners submit that *SEPTA* provides strong support for their position in this litigation.

It is just as unfair and inequitable for the Commission to deny Petitioners an Amtrak contribution toward their common costs in the instant case as it was for it to employ mere ownership as a basis for denying the local commuter authority a Conrail contribution toward that authority's common costs in *SEPTA*, and for the very same reasons. First, the Commission's decision, in practice, fails to "reflect the relative use on the line by the type of service being provided" by Amtrak, *SEPTA, 644* F.2d, at 252, because it gives a free ride to someone whose relative usage of 70 miles of a 75-mile long line of railroad is substantial by any standard—anywhere from 15.9% to 23.7%, depending on the allocation factor employed.[5] And the "type of service" being given that free ride is not a slow-moving freight service which receives little benefit from Petitioners' sophisticated signal and switching systems and its expensive maintenance programs; it is a high-speed passenger service which takes full advantage of those systems and programs. Second, considering those special benefits, and considering the substantial usage levels enjoyed by Amtrak, the imposition on Petitioners of all but an insignificant fraction of common costs in the circumstances of this case does no more "accord with notions of equitable sharing" *id.*, at 252, than did the Com-

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and Conrail on a basis agreeable to both, were not in issue. It cannot be doubted, however, that the court would have said precisely the same thing of variable common costs had they, too, been in dispute.

[5]See discussion of relative usage in Petition, at 20, 21 and n. 24.

mission's ownership-based denial of a Conrail contribution toward fixed common costs in *SEPTA*.

Petitioners submit that the decision of the Third Circuit in *SEPTA* is an indictment of the free-ride concept inherent in avoidable costing. Petitioners submit, further, that the Commission shares the Third Circuit's views and that it applied avoidable-costing rules in this case not because it believes that those rules are fair and equitable but because it was told to do so by Congress. When it has had a free hand in the selection of a costing methodology, and when it is adjudicating in the context of an acknowledged taking, the Commission has employed fully-allocated costing, just as Petitioners urged it to do in the instant case. Thus, in a case arising under the terminal-sharing provisions of Sec. 3(5) of the Interstate Commerce Act, now codified at 49 U.S.C. §11103(a), where the Commission was specifically instructed by Congress to determine the compensation payable to a terminal owner using principles employed in condemnation proceedings, this same Commission declared that the sharing of *all* common costs *including* depreciation, on a "user basis" was "fair". See *MKT Railroad Co. v. Kansas City Terminal Railway Company*, 198 I.C.C. 4 (1933), at 12.[6] And when the Commission handed down its first relevant decision under the statute governing this case, Sec. 402(a) of the RPSA, *before* that statute's "just

[6]The terminal-sharing statute is the only federal law known to Petitioners with a reach comparable to Sec. 402(a) of RPSA. Under that statute, too, it is possible for the Commission to compel a railroad to accept the entry of another railroad's trains onto its property indefinitely. The constitutionality of the statute has never been contested in a federal court, a circumstance which may well be attributable to the fact that the Commission has employed fully-allocated costing principles in its application. *MKT* is regarded as the Commission's controlling precedent in the application of the statute. The Court of Appeals held in this case that *MKT* did not involve the question of "how much compensation is constitutionally required." Petitioners' Appendix, at 22a. And yet the terminal-sharing statute there at issue then commanded, and still does, that constitutional concepts be invoked, that is that compensation be established "under the principle controlling compensation in condemnation proceedings" (see current version at 49 U.S.C. §11103(a), penultimate

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and reasonable" compensation command was converted to an avoidable-costing command,[7] this same Commission held that where a minority user's operations were at all substantial, it should share in all common costs on a usage basis in accordance with the rules of fully-allocated costing. *Trustees of Property of Penn Central—Compensation for Passenger Service*, 342 I.C.C. 820 (1973). Indeed, it was this latter decision which prompted Congress to amend Sec. 402(a) to require avoidable costing and to issue a conference committee report instructing the Commission that in no event was Amtrak to be required to contribute to a contracting railroad's common costs.[8]

In reciting this sequence of events, Petitioners should not be understood as being critical of Congress' decision to mandate avoidable costing. If Sec. 402(a) is construed as applying to just those private railroads which joined the Amtrak club in 1971 and succeeded in shedding their deficit-ridden long-haul passenger operations at the price of a dues payment equal to just a fraction of one year's deficit, then the Congressional decision to deny a contribution toward common costs is understandable. Avoidable costing in that context would not be unjust. The participating

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sentence). Moreover, *MKT* made it clear time and again that that was precisely what the Commission was attempting to do, to apply condemnation principles (*id.* at 4, 5, 13 and 14). And a subsequent decision of the Commission, *Chicago-Milwaukee Trackage Rights*, 342 I.C.C. 578 (1973), characterized *MKT* as having determined "condemnation criteria" to be applied in joint terminal occupancies.

[7]The Government contends that when M.T.A. contracted to rescue Penn Central in 1972, Section 402(a) was already "on the books" and M.T.A. had fair warning that avoidable costing was all it could expect if compensation ever became an issue. That claim is patently erroneous. When M.T.A. committed itself to Penn Central Section 402(a) mirrored the Fifth Amendment by requiring the payment of just and reasonable compensation, nothing less. The avoidable-costing mandate which provoked this litigation was subsitituted in 1973, more than a year later.

[8]See Amtrak Improvement Act of 1973, Pub. L. No. 93-146, §10(1). And see Conference Rep. No. 93-587, 93rd Cong., 1st Sess. (1973), at 6. To quote the conference report, "The term 'incremental' [*i.e.* avoidable] does not include any portion of common costs."

railroads would be receiving compensation from Amtrak roughly equivalent to the amounts they would have saved "had they simply discontinued [long-haul] passenger service." See the dissent of Commissioner O'Neal in *Trustees of Property of Penn Central—Compensation for Passenger Service, supra,* 342 I.C.C., at 836. Unfortunately the Court of Appeals rejected Petitioners' argument that Sec. 402(a) was intended to be so limited and that it should not be construed as applying to entities like Petitioners who were never engaged in the long-haul passenger business.[9]

[9]Absent a Sec. 402(a) remedy, Amtrak would still have the right to requisition the use of Petitioners' facilities. Petitioners firmly believe that Congress made specific provision for the use of the Hudson line by both Amtrak and Conrail when it enacted the Northeast Rail Service Act of 1981. Petitioners believe that that provision, Sec. 504(f) of the RPSA, as added by Sec. 11347 of NRSA, accomplished a statutory condemnation of trackage rights over the line for their special benefit. If Petitioners are correct in that belief, that provision specifically requires both Amtrak and Conrail to pay MTA "just and reasonable compensation", *not* limited to avoidable costs, *not* reduced by penalties for poor performance, *not* subject to the bait of bonuses and *not* as determined by the Commission rather than by an Art. III Court, for their use of the line. Moreover, Petitioners believe that Judge Friendly ultimately came to share their belief. See Petitioners' Brief in the Court of Appeals, at 18-22. The Court of Appeals disagreed, giving Sec. 504(f) an interpretation, in the process, which defies common sense. Petitioners nevertheless do not complain of that error for the reason that even if Section 504(f) had been held to be controlling, the Court of Appeals would surely have held that the use of avoidable costing satisfies its "just and reasonable" compensation standard. It is that precise issue which is fundamental to this litigation because a statutory "just and reasonable" standard and the constitutional standard of "fairness and equity" which the Petitioners believe this case invokes are one and the same. *New Haven Inclusion Cases*, 399 U.S. 392 (1970). Petitioners have raised that issue in their Petition. They earnestly seek to have it determined by this Court.

CONCLUSION

For these reasons, and for the reasons stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

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